Due service and receipt of a copy of the within is hereby admitted

this.....*day of October, 1929.*

.....

Counsel for Petitioner.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 423

RUFFIN COLLIE, CLINTON COOK, AND ROBBIE ROWE, PETITIONERS,

vs.

THOMAS D. FERGUSSON, F. W. DARLING, AND J. S. DARLING, TRADING AS J. S. DARLING & SON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 26, 1929

CERTIORARI GRANTED OCTOBER 28, 1929

(34,554)

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TRANSCRIPT OF RECORD

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF VIRGINIA, *as*:

At a District Court of the United States for the Eastern District of Virginia, begun and held in the Court Room of said Court House and Post Office Building, in the City of Norfolk, Virginia, on the first Monday of May, being the seventh day of the same month, in the year of our Lord one thousand Nine Hundred and Twenty-Eight.

Present: The Honorable D. Lawrence Groner, Judge of the District Court of the United States for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

F. W. Darling and J. S. Darling, trading as J. S. Darling and Son, Libellants,
and
Ruffin Collie, Clinton Cook, and Robbie Rowe; Nye, The Engine Man, Incorporated, S. M. Sinclair, W. J. Williamson, J. C. Council, E. T. Lawson and I. E. Lawson, trading as E. T. Lawson & Son, L. Johnson and H. L. Corkran, trading as Johnson and Corkran, and J. V. Bickford, Intervening Libellants,
v.
Power Boat "Dola Lawson" and Thomas D. Fergusson, her owner, Respondents.

In Admiralty. No. 4809.

LIBEL.

(2) Filed May 14, 1928.

F. W. Darling and J. S. Darling trading as J. S. Darling and Son, Libellants,
Against
The Power Boat "Dola Lawson" and Thomas D. Fergusson, owner.
} In Admiralty.

To the Honorable D. Lawrence Groner, Judge of the said court:

The libel of F. W. Darling and J. S. Darling trading as J. S. Darling Son against the Power Boat "Dola Lawson" of Hampton, Virginia, her tackle, apparel and furniture, and against all persons intervening for their interest therein, and especially Thomas D. Fergusson, owner, in a cause of contract, civil and maritime, alleges as follows:

1. During the years 1926 and 1928, the said vessel being at Hampton, Virginia, and standing in need of certain repairs, supplies or other necessaries, the libellant, upon the order of the owner or owners of said vessel or of a person by him or them authorized, furnished to her certain repairs, supplies or other necessaries. The schedule hereto annexed and made a part hereof is a just and true statement of the said repairs, supplies or other necessaries; the charges in said schedule are just and reasonable, and said repairs supplies or other necessaries were necessary and proper; and libellants have a maritime lien therefor.

2. There is now due on account thereof the sum of Five Hundred Forty Three and 07/100 Dollars, ($543.07), with interest thereon as shown by the schedule aforesaid, which although demanded, has not been paid.

(3) 3. The said vessel is now in the Eastern District of Virginia.

4. All and singular the premises are true, and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellants pray that process in due form of law according to the course of this Honorable Court in cases of Admiralty and Maritime jurisdiction may issue against the said vessel, her tackle apparel and furniture; that all persons claiming any right, title or interest therein and especially Thomas D. Fergusson, owner, may be cited to appear and answer on oath all and singular the matters aforesaid; that the said vessel may be condemned and sold to pay the amount due libellants, with interest and costs; and that libellants may have such other and further relief as in law and justice they may be entitled to receive.

F. W. DARLING and
J. S. DARLING,
trading as J. S. Darling and Son,
By R. AUTHOR JETT,
Proctor under the Rule.

KELSEY & JETT,
Citizens Bank Bldg. Norfolk, Va.
Proctors.

Subscribed and sworn to before me this 14th day of May A. D., 1928.

EVELYN STROUD,
Notary Public.

My commission expires February 23rd, 1930.

(4) **INTERVENING PETITION OF RUFFIN AND CLINTON COOK, WHO SUE UNDER THE REVISED STATUTES OF THE UNITED STATES PERMITTING SEAMEN TO SUE FOR THEIR WAGES AND TO ENFORCE LAWS FOR THEIR HEALTH AND SAFETY, WITHOUT SECURITY OR PREPAYMENT OF COSTS.**

Filed May 16, 1928.

To the Honorable D. Lawrence Groner:

The libel and petition of Ruffin Collie and Clinton

Cook, members of the crew of the Power Boat "Dola Lawson" of which vessel Thomas D. Fergusson is owner against the said Power Boat "Dola Lawson" her boats, rigging, tackle, apparel and furniture, and all persons claiming a lawful interest therein, and/or Thomas D. Fergusson, as owner of said vessel, in a cause of wages and damages, civil and maritime, alleges and propounds as follows:

1. That on or about the 15th day of January, 1928, your petitioner, Ruffin Collie, while said vessel was at Washington, North Carolina, became and was employed by the said Thomas D. Fergusson, owner as aforesaid, as a cook and seaman on board the said Power Boat "Dola Lawson" at the rate of wages of One Hundred Dollars ($100.00) per month, and as such, well and faithfully performed all and singular his duties and labors up to the time he was forced to discontinue same as hereinafter noted.

2. That on or about the 1st day of January, 1928, your petitioner Clinton Cook, who had theretofore been employed on said vessel as a deckhand and oiler was re-engaged, in the same capacities, on board said Power Boat "Dola Lawson", at the rate of wages of Eighty Dollars ($80.00) per month, and as such, well and faithfully performed all and singular his duties and labors up to the time he was forced to discontinue same as hereinafter noted.

3. That at approximately 1:00 P. M. on the 14th day of May, 1928, the said vessel was seized by the Mar-
(5) shal of this Court, under and by virtue of the libel, heretofore filed in this cause by J. S. Darling & Son, to recover a sum upwards of Five Hundred Dollars ($500.00) and costs, and the said Power Boat "Dola Lawson" is now in the charge and custody of said Marshal.

4. That though both of said petitioners were at all times entitled to their wages and extra-wages, by way of overtime as hereinafter noted, for the labor performed by them on said vessel and have repeatedly made demands therefor on the said owner, neither the said wages earned by them, as aforesaid, nor any part thereof (ex-

cept Twenty-Five Dollars ($25.00) paid to Petitioner Collie on or about the 1st day of February, 1928, on account of the wages due him for the half month he performed labor in January, 1928) were paid to them or either of them, and the said wages still remain unpaid, the said vessel and the said respondent having failed and refused to pay your petitioners any sum whatsoever.

5. That by reason of the premises, petitioners,—in addition to Three Hundred and Seventy-Five Dollars ($375.00) straight wages and Twenty Dollars ($20.00) overtime (four nights @ $5.00 per night), due Petitioner Collie and Three Hundred and Sixty Dollars ($360.00) straight wages and Twenty Dollars ($20.00) overtime (four nights @ $5.00 per night), likewise due to Petitioner Cook, and such amounts as might be decreed each of them by reason of the respondents' breach of contract, —claim to be entitled to demand and have from the said vessel and said respondent "waiting time" under and by virtue of the provisions of Section 4529 of the Revised Statutes of the United States, as amended, that is to say. —Two days pay for each day that their wages, due for work done as aforesaid, are withheld without sufficient cause. And Petitioner Collie further claims to be entitled to return transportation and subsistence to Washington, North Carolina, the port of his shipment.

6. That in addition to the libel of the said J. S. Dar-
(6) ling & Son, an intervening petition has been filed herein by Nye The Engine Man, Incorporated, claiming the sum of Three Hundred and Ten and 37/100 Dollars ($310.37) and costs, and your petitioners, on the basis of these claims and taking into consideration that other claims will probably be filed, are advised and believe that it will be to the best interest of all parties to have the said power boat sold at the earliest possible moment in order to avoid any unnecessary expense, all of which will most likely have to be borne by the lienors. Petitioners further set forth that their claims for "waiting time" are increasing at the aggregate rate of Twelve Dollars (12.00) per day and that if their claims are not paid until a distribution is had in the ordinary course, in view of the broken down condition of the said power boat and the present low value of vessels of this character,

there will not be a sufficient sum realized from its sale to cover the amounts which will be lawfully due unto your said petitioners.

7. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, petitioners pray that process in due form of law, according to the course of this Honorable Court, in causes of Admiralty and Maritime jurisdiction, may issue against the Power Boat "Dola Lawson", her boats, rigging tackle, apparel and furniture, and that all persons having any interest therein may be cited to appear and answer on oath all and singular the matters aforesaid; and that Thomas D. Fergusson, owner of said vessel be cited to appear and answer on oath the matters aforesaid; that the said vessel be forthwith condemned and sold to pay the amount of petitioners' claims for their earned wages totaling Seven Hundred and Seventy-Five Dollars ($775.00) as aforesaid, (7) together with the "waiting time" herein prayed for and proper damages for the respondents' breach of contract, including Petitioner Collie's transportation and subsistence to Washington, North Carolina, and costs, and that, in addition, any goods and chattels of the said owner may be also sold and condemned to pay any deficiency, and that the petitioners have such other and further relief as may be just and proper.

RUFFIN COLLIE,
CLINTON COOK.

J. L. MOREWITZ and
PERCY CARMEL,
Proctors for Petitioners.

Subscribed and sworn to before me on this 15th day of May, 1928.

J. L. MOREWITZ,
Notary Public.

INTERVENING LIBEL AND PETITION OF S. M. SINCLAIR

(8) Filed May 16, 1928.

To the Honorable D. Lawrence Groner, Judge of the said Court:

The intervening libel and petition of F. C. Sinclair trading as Motor Boat Machine Works against the Power Boat "Dola Lawson" of Hampton, Virginia, her tackle, apparel and furniture, and against all persons intervening for their interest therein, and especially Thomas D. Fergusson, owner, in a cause of contract, civil and maritime, alleges as follows:

1. During the year 1927 and 1928, the said vessel being at Hampton, Virginia, and standing in need of certain repairs, supplies or other necessaries, the libellant and petitioner, upon the order of the owner or owners of said vessel or of a person by him or them authorized, furnished to her certain repairs, supplies or other necessaries. The schedule hereto annexed and made a part hereof is a just and true statement of the said repairs, supplies or other necessaries; the charges in said schedule are just and reasonable, and said repairs supplies or other necessaries were necessary and proper; and libellant and petitioner has a maritime lien therefor.

2. There is now due on account thereof the sum of Three Hundred Fifty Five and 49/100 Dollars ($355.49), with interest thereon as shown by the schedule aforesaid, which although demanded, has not been paid.

3. The said vessel is now in the Eastern District of Virginia.

4. All and singular the premises are true, and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

(9) Wherefore, libellant and petitioner prays that process in due form of law according to the course of this Honorable Court in cases of Admiralty and Maritime jurisdiction may issue against the said vessel, her tackle,

apparel and furniture; that all persons claiming any right, title or interest therein and especially Thomas D. Fergusson, owner, may be cited to appear and answer on oath all and singular the matters aforesaid; that the said vessel may be condemned and sold to pay the amount due libellant and petitioner, with interest and costs; and that libellant and petitioner may have such other and further relief as in law and justice he may be entitled to receive.

F. M. SINCLAIR,
trading as Motor Boat Machine Works
By R. ARTHUR JETT,
Proctor under the Rule.

KELSEY & JETT,
Citizens Bank Bldg., Norfolk, Va.
Proctors.

Subscribed and *sowrn* to before me this 16th day of May, A. D., 1928.

EVELYN STROUD,
Notary Public.

My commission expires February 23rd, 1930.

LIBEL AND PETITION OF E. T. LAWSON & SON.

(10) Filed May 21, 1928.

To the Honorable D. Lawrence Groner, Judge of the said Court:

The libel and petition of E. T. and I. E. Lawson, partners trading as E. T. Lawson & Son, against the Power Boat Dola Lawson her tackle, apparel and furniture, and against all persons intervening for their interest therein, and against the respondent hereinabove named, in a cause of contract, civil and maritime, alleges as follows:

1. During the years 1927 and 1928 said vessel being at Hampton, Virginia, and standing in need of certain repairs, supplies or other necessaries, the libellant and petitioner, upon the order of the owner or owners

of said vessel or of a person by him or them authorized, furnished to her certain repairs, supplies or other necessaries; and the said respondent promised to pay for same whenever requested so to do. The schedule hereto annexed and made a part hereof is a just and true statement thereof; the charges in said schedule are just and reasonable, and said repairs, supplies or other necessaries were necessary and proper; and libellant and petitioner has a maritime lien therefor.

2. There is now due on account thereof the sum of six hundred and eighty seven and 36/100 Dollars ($687.36), with interest thereon as shown by the schedule aforesaid, which, although demanded, has not been paid.

3. The said vessel is now in the eastern District of Virginia.

4. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

(11) Wherefore, the libellant and petitioner prays that process in due form of law, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against said vessel, her tackle, apparel and furniture, and against the aforesaid respondent; that all persons claiming any right, title or interest in said vessel, and also said respondent, may be cited to appear and answer on oath all and singular the matter aforesaid; that said vessel may be condemned and sold to pay the amount due libellant and petitioner, with interest and costs; and that libellant and petitioner may have a decree for said amount against the respondent, and such other and further relief as in law and justice it may be entitled to receive.

E. T. LAWSON & SON,
E. T. LAWSON.

HUGHES, LITTLE & SEAWELL, *Proctor.*

Subscribed and sworn to before me this 21st day of May, A. D., 1928, by E. T. Lawson.

JULIA K. GOFF,
Notary Public.

Law Offices of
Hughes, Little & Seawell,
Norfolk, Virginia.

INTERVENING LIBEL AND PETITION OF W. J. WILLIAMSON, TRADING AS ETC.

(12) Filed May 24, 1928.

To the Honorable D. Lawrence Groner, Judge of the said Court:

The intervening libel and petition of W. J. Williamson, trading as Williamson's, against the Power Boat "Dola Lawson", of Hampton, Virginia, her tackle, apparel and furniture, and against all persons intervening for their interest therein, and especially Thomas D. Fergusson, owner, in a cause of contract, civil and maritime, alleges as follows:

1. During the year 1928, the said vessel being at Hampton, Virginia, and standing in need of certain repairs, supplies or other necessaries, the libellant, upon the order of the owner or owners of said vessel or of a person by him or them authorized, furnished to her certain repairs, supplies or other necessaries. The schedule hereto annexed and made a part hereof is a just and true statement of the said repairs, supplies or other necessaries; the charges in said schedule are just and reasonable, and said repairs, supplies or other necessaries were necessary and proper; and libellant has a maritime lien therefor.

2. There is now due on account thereof the sum of Thirty and 41/100 Dollars ($30.41), with interest thereon as shown by the schedule aforesaid which although demanded, has not been paid.

3. The said vessel is now in the Eastern District of Virginia.

4. All and singular the premises are true, and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that process in due form (13) of law according to the course of this Honorable Court in cases of Admiralty and Maritime jurisdiction may issue against the said vessel, her tackle, apparel and furniture; that all persons claiming any right, title or interest therein and especially Thomas D. Fergusson, owner, may be cited to appear and answer on oath all and singular the matters aforesaid; that the said vessel may be condemned and sold to pay the amount due libellant, with interest and costs; and that libellant may have such other and further relief as in law and justice he may be entitled to receive.

W. J. WILLIAMSON,
trading as Williamson's
By R. ARTHUR JETT,
Proctor under the Rule.

KELSEY & JETT,
Citizens Bank Bldg., Norfolk, Va.
Proctors.

Subscribed and sworn to before me this 24th day of May, A. D., 1928.

EVELYN STROUD,
Notary Public.

My commission expires February 23rd, 1930.

INTERVENING LIBEL AND PETITION OF J. C. COUNCIL.

(14) Filed May 24, 1928.

To the Honorable D. Lawrence Groner, Judge of the said court:

The intervening libel and petition of J. C. Councill against the Power Boat "Dola Lawson" of Hampton, Virginia, her tackle, apparel and furniture, and against all persons intervening for their interest therein, and especially Thomas D. Fergusson, owner, in a cause of contract, civil and maritime, alleges as follows:

1. During the year 1927, the said vessel being at Hampton, Virginia, and standing in need of certain repairs, supplies or other necessaries, the libellant, upon the order of the owner or owners of said vessel or of a person by him or them authorized, furnished to her certain repairs, supplies or other necessaries. The schedule hereto annexed and made a part hereof is a just and true statement of the said repairs, supplies or other necessaries; the charges in said schedule are just and reasonable, and said repairs, supplies or other necessaries were necessary and proper; and libellant has a maritime lien therefor.

2. There is now due on account thereof the sum of Ninety Dollars and Thirty-Five Cents ($90.35), with interest thereon as shown by the schedule aforesaid, which although demanded, has not been paid.

3. The said vessel is now in the Eastern District of Virginia.

4. All and singular the premises are true, and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that process in due form (15) of law according to the course of this Honorable Court in cases of Admiralty and Maritime jurisdiction may issue against the said vessel, her tackle, apparel and furniture; that all persons claiming any right, title or interest therein and especially Thomas D. Fergusson, owner, may be cited to appear and answer on oath all and singular the matters aforesaid; that the said vessel may be condemned and sold to pay the amount due libellant, with interest and costs; and that libellant may have such other and further relief as in law and justice he may be entitled to receive.

J. C. COUNCILL,
By R. ARTHUR JETT,
Proctor under the Rule.

KELSEY & JETT,
Citizens Bank Bldg., Norfolk, Va.
Proctors.

Subscribed and sworn to before me this 24th day of May, A. D., 1928.

EVELYN STROUD,
Notary Public.

My commission expires February 23rd, 1930.

INTERVENING PETITION OF JOHNSON & CORKRAN.

(16) Filed May 25, 1928.

To the Honorable D. Lawrence Groner, Judge of the Court aforesaid:

The intervening libel and petition of L. Johnson and H. L. Corkran, partners trading as Johnson and Corkran, of Crittenden Virginia, operators of a Maritime Railway, against the Power Boat "Dola Lawson", whereof, Thomas Furguson is owner, her engines, rigging, tackle, apparel and furniture and against the said Thomas D. Fergusson and all other persons intervening for their *interested* therein in a cause of contract, civil and maritime, *alleged* as follows:

1. That during the month of July in the year 1927, the said Power Boat, "Dola Lawson", then in the harbor or Crittenden, Virginia, and standing in need of certain repairs, the libellant at the request of the owner of the said Power Boat "Dola Lawson", or his agents, furnished to her, certain labor and repairs; that the schedules hereto annexed and prayed to be read as a part of this libel, are a just and true statement of said labor and repairs; that the charges in said schedules are just and reasonable and that said labor and repairs were necessary and proper and were furnished on the credit of the vessel as well as of her owner and constituted a lien thereon whether by the general maritime law or by the statutes for such cases made and provided:

2. That there is now due to the said libellants on account od said labor and repairs, the sum of $423.50 with interest thereon from July 16, 1927, as shown by the schedules aforesaid, which *allthough* often demended, has not been paid, nor any part thereof:

(17) 3. That the said vessel is now in the Eastern District of Virginia in the custody of the *Marshall* of this Court:

4. That all and singular the premises are true, and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE the libellant prays that process in due form of law according to course of this Honorable Court in cases of Admiralty and Maritime jurisdiction may issue against the said vessel, her engines, rigging, tackle, apparel and furniture, and against the owner of the said vessel and that all persons claiming any rights, title or interest therein may be cited to appear and answer on oath all and singular, the matters aforesaid; and that the said vessel may be *condemed* and sold to pay the amount due the libellants, with interest and costs, and that the libellants may have such other and further relief as in law and justice they may be entitled to receive.

JOHNSON & CORKRAN,
By H. L. CORKRAN.

HENRY BOWDEN,
SAMUEL E. FORWOOD, Proctors.

STATE OF VIRGINIA,
(18) County of Nansemond, to-wit:

This day H. L. Corkran personally appeared before the undersigned, a Notary Public in and for the County aforesaid, in the State of Virginia and after being duly sworn by me in my said County subscribed the foregoing libel and made oath that he is a member of the partnership of Johnson and Corkran and that as such he is duly authorized to sign the foregoing libel and make affidavit thereto; that the matters and things stated in the foregoing libel are true and that the schedule thereto attached is just and reasonable, due and unpaid according to the best of his knowledge, information and belief.

Witness my hand and Notarial seal this 24 day of May, 1928.

MRS. J. H. SHREVES,
Notary Public.

My commission expires January 2, 1931.

CLAIM OF J. V. BICKFORD.

(19) Filed May 29, 1928.

Mr. T. D. Ferguson,
Power Boat—Dola Lawson
Railway Bill—Caulking

In Account With

J. V. BICKFORD

Apr. 27	Labor	7.50	
"	"	n 12.50	
30	"	11.00	
	"	11.25	
			42.25

I certify that the above is a true and correct of T. D. Fergusson's account.

J. V. BICKFORD.

Subscribed and sworn to before me this 28th day of May 1928.

R. V. BELL,
Notary Public.

(20) (Original Filed May 15, 1928)

AMENDED INTERVENING LIBEL OF NYE, THE ENGINE MAN, INC.

Filed June 8th, 1928.

To the Honorable D. Lawrence Groner, Judge of the said court:

The intervening libel of Nye the Engine Man, In-

corporated, against the Power Boat "Dola Lawson" of Hampton, Virginia, her tackle, apparel and furniture and against all persons intervening for their interest therein and especially Thomas D. Fergusson, owner, in a cause of contract, civil and maritime, alleges as follows:

1. During the year 1928, the said vessel being at Hampton, Virginia, and standing in need of certain repairs, supplies or other necessaries, the intervening libellant, upon the order of the owner or owners of said vessel or of a person by him, or them authorized, furnished to her certain repairs, supplies or other necessaries. The schedule hereto annexed and made a part hereof is a just and true statement of the repairs, supplies or other necessaries; the charge in said schedule are just and reasonable and said repairs, supplies or other necessaries, were necessary and proper; and intervening libellants have a maritime lien therefor.

2. There is now due on account thereof the sum of Three Hundred Eighty and 27/100 Dollars ($380.27) with interest thereon as shown by the schedule aforesaid, which although demanded has not been paid.

3. The said vessel is now in the Eastern District of Virginia.

4. All and singular the premises are *ture*, and *with* the Admiral*ty* and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, your intervening libellants pray that process in due form of law according to the course of this Honorable Court in cases of Admiral*ty* and Maritime (21) jurisdiction may issue against the said *vellel*, her tackle, apparel and furniture; that all persons claiming an*d* right, title or interest there*on* and especially Thomas D. Fergusson, owner, may be cited to appear and answer on oath all and singular the matters aforesaid; that the said vessel may be condemned and sold to pay the amount due the intervening libellants, with interest and costs; and that the intervening libellants may have such other

and further relief as in law and justice they may be entitled to receive.

NYE THE ENGINE MAN INC.
By L. B. NYE.

WALTER SIBERT,
308-10-12 Royster Bldg.,
Norfolk, Va.
Proctor.

Subscribed and sworn to before me this 8 day of June A. D. 1928.

WALTER SIBERT,
Notary Public.

My commission expires on the 16th day of July, 1929.

INTERVENING PETITION OF ROBBIE ROWE, EX-ENGINEER ON THE POWER BOAT "DOLA LAWSON".

(22) Filed June 23, 1928.

To the Honorable D. Lawrence Groner

The libel and petition of Robbie Rowe, ex-member of the crew of the Power Boat "Dola Lawson" of which vessel Thomas D. Fergusson is owner against the said Power Boat "Dola Lawson" her boats, rigging, tackle, apparel and furniture, and all persons claiming a lawful interest therein, and/or Thomas D. Fergusson, as owner of said vessel, in a cause of wages and damage, civil and maritime, alleges and propounds as follows:

1. That on or about the 1st day of September, 1927, your petitioner, Robbie Rowe, became and was employed by the said Thomas D. Fergusson, owner as aforesaid, as a seaman on board the said Power Boat "Dola Lawsn" at the rate of wages of Twenty-Five Dollars ($25.00) per week, and as such, well and faithfully performed all and singular his duties and labors for six (6) weeks thereafter, when his employment terminated by

mutual consent, but no part of said wages, (except Five Dollars ($5.00) paid him at the end of the third week of his employment) have been paid, though often demanded, and there is now due your petitioner a balance of One Hundred and Forty-Five Dollars ($145.00) on account of his said wages.

2. That though your petitioner was at all times entitled to the balance of his wages for the labor performed by him on said vessel and has repeatedly made demand therefor on the said owner, neither the said balance of wages earned by him, as aforesaid, nor any part thereof were paid to him, and the said wages still remain unpaid, the said vessel and the said respondent having failed and refused to pay your petitioner any sum whatsoever, other than the aforesaid Five Dollars ($5.00).

3. That by reason of the premises, petitioner claims to be entitled to demand and have from the said vessel (23) and said respondent "waiting time" under and by virtue of the provisions of Section 4529 of the Revised Statutes of the United States, as amended, that is to say:—Two days pay for each day that the balance of his wages, due for work done as aforesaid, are withheld without sufficient cause.

4. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, petitioner prays that process in due form of law, according to the course of this Honorable Court, in causes of Admiralty and Maritime jurisdiction, may issue hereon in respect to the proceeds of the sale heretofore had by the Marshal of this Court of the Power Boat "Dola Lawson", her boats, rigging tackle, apparel and furniture, which proceeds are now in the Court's registry, and that all persons having any interest therein may be cited to appear and answer on oath all and singular the matters aforesaid; and particularly that Thomas D. Fergusson, owner of said vessel be cited to appear and answer on oath the matters aforesaid; that this Court will be pleased to enter its decree allowing your petitioner to recover the balance of his said earned

wages, totalling One Hundred and Forty-Five Dollars ($145.00) as aforesaid, together with the "waiting time" herein prayed for, and costs, out of the aforesaid fund now in its registry, and in addition, should there be any deficiency, that he be awarded a judgment over against the said Thomas D. Fergusson, owner for any such deficiency, and that the petitioner have such other and further relief as may be just and proper.

his
ROBBIE (x) ROWE.
mark

Witness:—

J. C. EVANS.

J. L. MOREWITZ,
Proctor for Petitioner.

Subscribed and sworn to before me on this 22nd day of June, 1928.

J. L. MOREWITZ,
Notary Public.

EXCEPTIONS AND ANSWER OF J. S. DARLING AND SON TO INTERVENING PETITION OF ROBBIE ROWE.

(24) Filed July 18, 1928.

Exceptions and answer of J. S. Darling and Son to the intervening petition of Robbie Rowe, respectfully represent unto the Court as follows:

EXCEPTIONS.

The said J. S. Darling and Son except to the intervening petition of the said Robbie Rowe, and the claim of penalties therein on the ground that it appears from the said petition that the said wages were earned during the month of September, 1927, and that no action was taken by the said intervening petitioner to assert his claim until after the claims of other seamen had been adjudicated and a decree of sale entered by this Court and that the said petitioner, by his said delay in enforcing his claim for penalties, has thereby waived the same.

ANSWER.

The said J. S. Darling and Son, for answer to the said intervening petition of Robbie Rowe, *denies* each and every one of the allegations set forth in said petition, and *demands* strict proof thereof.

And for further answer, the said J. S. Darling and Son *alleges* upon information and belief that the said power boat "Dola Lawson", and her owner, are not indebted for wages or on account of fishing share to the said Robbie Rowe in any sum whatsoever, and that the said Thomas D. Fergusson, owner of said power boat, (25) some months ago paid the said Robbie Rowe all sums due him on account of wages or share in proceeds of fish caught by said power boat.

Your respondent accordingly prays that the said intervening petition be dismissed with costs.

J. S. DARLING AND SON,
By R. ARTHUR JETT.

STATE OF VIRGINIA,
City of Norfolk, to-wit:

R. Arthur Jett, being duly sworn, deposes and says that he is authorized to sign the name of said J. S. Darling and Son to the foregoing exceptions and answer, and that the facts stated therein are true to the best of his own knowledge, information and belief.

R. ARTHUR JETT.

Sworn and subscribed to before me this 17th day of July, 1928.

EVELYN STROUD,
Notary Public.

My commission expires February 23rd, 1930.

(26) (Title omitted)

ORDER OF SALE.

Filed June 2, 1928.

This Cause came on this day to be heard on the *lible* and intervening libels and petitions heretofore filed herein and was argued by counsel.

And It Appearing to the Court, that the time allowed by law and the rules of this Court for making defense to the said libel and intervening libels and petitions has elapsed, and that no appearance has been entered and no answer or defense interposed, and that it will be to the best interest of all parties concerned that the said Power Boat "Dola Lawson", now in the custody of the Marshal of this Court, be sold in order to obviate further expense, it is Adjudged, Ordered and Decreed that the said Power Boat "Dola Lawson", her engines, boilers, tackle, apparel and equipment, be sold at public auction at the Plume Street entrance of the United States Post Office and Court House Building, Norfolk, Virginia, for cash to the highest bidder by the Marshal of this District, or his deputy, after five (5) days advertising of the terms, time and place of sale as required by the rules and practice of this Court; that the Marshal, or his deputy, do require of the successful bidder of the said vessel a deposit of twenty-five per cent (25%) of the amount bid to be paid at the time said vessel is knocked down to said bidder and the remainder of said purchase price to be paid within forty-eight (48) hours thereafter; that said sale be subject to the approval of this Court and that the proceeds of sale be de-
(27) posited in the registry of the Court to the credit of this cause to await the further order of the Court herein.

D. LAWRENCE GRONER,
U. S. District Judge.

Norfolk, Virginia.

(28) (Caption omitted)

MARSHAL'S REPORT OF SALE.

Filed June 20, 1928.

Honorable D. Lawrence Groner,
United States District Judge,
Eastern District of Virginia.

Sir:

As Marshal of said Court I have to report that in obedience to an Order in the said cause entered on the

2nd day of June, 1928, and after complying with said order by advertising the time, place and terms of sale, I sold on the 18th day of June, 1928, the Power Boat Dola Lawson at Public Auction to E. T. Lawson of Hampton, Virginia, and H. L. Corkran, of Crittenden, Virginia, for the sum of Sixteen Hundred and Fifty Dollars ($1,650.00) that being the highest bid, and have paid the same to the Clerk of this Court to be by him deposited in the Registry of the Court.

Respectfully submitted,

CLARENCE G. SMITHERS,
United States Marshal.
By G. S. PITMAN,
Deputy U. S. Marshal.

Norfolk, Aa.

(29) **STATEMENT OF THE EVIDENCE BEFORE HONORABLE D. LAWRENCE GRONER, UNITED STATES DISTRICT JUDGE, AT NORFOLK, VIRGINIA, JUNE 8TH, 1928.**

Narrative filed in Clerk's Office December 19, 1928.

Present: Messrs. Kelsey & Jett for the libelant, Darling & Son, and petitioners Sinclair, Williamson and Counc'l; Mr. H. H. Little for E. T. Lawson and Son; Mr. Walter Sibert for Nye, the Engineman, Inc.; Mr. J. L. Morewitz for the petitioning seamen; Mr. Samuel E. Forwood for Johnson & Corkran.

Mr. FORWOOD: I would like to make a motion that this case be not closed today. I didn't get notice in time enough to get my client over here.

CLINTON COOK, one of the petitioning seamen, sworn, testified as follows:

Examined by Mr. MOREWITZ:

I was employed on the Power-boat "Dola Lawson" to work on the deck and as oiler for the engine. This boat had a Mianus Diesel oil engine. I went aboard her this last time on the first of January, 1928. Mr. Thomas

D. Fergusson, the owner of the boat, employed me at that time at the rate of $80.00 per month. I have been aboard her ever since, until the United States Marshal seized her.

The COURT: What kind of a boat was it?
Mr. MOREWITZ: Fishing boat.

By Mr. MOREWITZ:

I was supposed to get $80.00 a month but have not been paid any part of it. Mr. Fergusson, the owner, (30) has not paid me nor given me any security for my money, he said he didn't have it. I saw him on the street this morning. The cook aboard the ship was a white man by the name of Collie, whom I know.

Q. How much was he supposed to get a month?

Mr. JETT: We object to the witness testifying—

By the COURT:

Q. How do you know? A. I was there when he told him.

By Mr. MOREWITZ:

Mr. Fergusson, the owner, was supposed to pay Collie $100.00 per month. Collie was hired by Mr. Fergusson at Washington, North Carolina and remained aboard her ever since until she tied up.

By the COURT: How much is this man claiming?
Mr. MOREWITZ: $360.00.
By the COURT: You didn't get anything while you were aboard at all? A. No, sir.
Q. You didn't draw any money at all? A. No, sir.
Q. How long were you aboard? A. I worked from January 1st.

By Mr. MOREWITZ:

I worked for Mr. Fergusson nine years off and on before I went on board the "Dola Lawson" this time and always got my money previous to this. I worked four nights for which I was to be paid $5.00 per night extra. Ruffin Collie, the other man, worked extra the same

nights that I did and was supposed to get the same amount of money for each night.

By the COURT:

Q. Do you know whether he has been paid any of his money or not? A. No, sir. I haven't seen him get anything.

Q. You don't know whether he has been paid anything or not, do you?

Mr. MOREWITZ: We show in the libel he got $25.00.

CROSS EXAMINATION.

By Mr. JETT:

(31) I am not married. This boat was engaged in fishing. She is a trawling vessel. I have never been master of her while she was fishing. During the time she was in the oil trade, for about a year, I guess, my name was on the papers. My name is not still on the papers now. It is not supposed to be on there. I don't know exactly the date. It was, I figure about two years ago when Mr. Fergusson went master, but she wasn't fishing then.

By the COURT:

Q. What was she doing when you were master? A. She wasn't fishing.

Mr. MOREWITZ: Carrying oil for the Texas Company.

By the COURT:

Q. You were master then? A. Yes, sir.

By Mr. JETT:

Q. Your name so showed on the papers in the Custom House, didn't it? A. Yes, sir.

By the COURT:

Q. Who was master at this time we are talking about? A. Mr. Fergusson.

Q. Is he the man who owned her? A. Yes, sir.

Q. What was she doing when you went aboard of her in January? A. Fishing.

Q. Where was she fishing? A. North Carolina.

Q. North Carolina waters? A. Yes, sir.

Q. Trawl fishing? A. Yes, sir.

By Mr. JETT:

I was trawl fishing since about the middle of November, 1927, or something like that.

Q. You know, as a matter of fact, that practically all of these men that worked on these boats engaged in trawl fishing work on shares, don't you?

Mr. MOREWITZ: If they were on shares they would have a lien on the share basis. It wouldn't make any difference one way or the other. A. No, sir, I worked on wages.

By Mr. JETT:

(32) I don't know that all of the men that are engaged on trawl boats worked on shares; I haven't ever worked on them on shares. Captain Fergusson promised me $80.00 a month straight on wages. If the "Dola Lawson" made over $2,500 a month, had any luck fishing, he would give me a share. I was not working on shares. Captain Fergusson was going to give me a share in the catch if the boat made over $2,500 a month, but she never made it. I went to work on the "Dola Lawson" about the middle of November, 1927 and worked on her up until Christmas. She was engaged in trawl fishing at that time and I was getting wages of $20.00 a week. I went on her again the last time, on the first of January, 1928, when the boat was on the railway. I am not sure, but I think somewhere about the 10th, or the 7th or 8th of January, 1928, she started as a fishing boat in the trawling business when we left Hampton bound south. Mr. Fergusson hired me in Hampton this last time and promised me $80.00 a month. If we had any luck, got a good catch, and made over $2,500 a month, he would give me a bonus. He was not to give me any thing else excusing night work, we don't always have night work to do on boats; when we fish a night, we work all night and Captain Fergusson pays $5.00 each night for that. I tell the Court too, I worked on the "Dola Lawson" from the first of January, 1928 until J. S. Darling & Son libeled her in the middle of May and didn't draw a cent. As to what I lived on during that time, Captain Fer-

gusson was feeding me. He caught some fish during that time and sold some in Hampton and some in North Carolina, but didn't pay me a penny. There were three men employed on this boat altogether, Captain Fergusson, Ruffin Collie and myself. The "Dola Lawson" was (33) actually engaged in fishing all the time from January 1st, 1928, after we came off the railway, around about the 10th of January, until she was libeled on May 14th. Sometimes it would be three or four weeks, I guess, before we would take the fish into port to sell them. During that time we would stay on board the boat in Virginia or North Carolina waters. She was not cruising all that time, but we would go around and lay there three or four days, we couldn't always go out on the ocean because of bad weather. I don't know how many fish we caught during this time from January until May, when the boat was libeled.

By the COURT:

Q. What kind of fish did you catch? A. Catch Croakers, King fish and Flounders.

Q. How many times did he take fish in down in North Carolina to sell them? A. I think he made about three trips.

Q. Who did he take them to? A. Taken some to Washington and some Elizabeth City and Hampton.

Q. You made about three trips down in North Carolina, if I understand you right; is that right? A. Yes, sir.

Q. How many trips did you make in to deliver fish in Virginia? A. Well, we haven't caught any fish in Virginia—over twenty barrels.

Q. How many have you sold in Hampton, regardless of where you caught them? A. I say about twenty barrels.

Q. Is that all you sold in Hampton? A. Yes, sir.

Q. The rest of them you sold down in North Carolina? A. Yes, sir.

Q. Who was the dealer that you sold them to down in Washington? A. I don't know his name.

Q. Who was the dealer you sold them to in Elizabeth City? A. I don't know.

Q. Who was the dealer you sold them to in Hampton; you know him don't you? A. Lewis.

CLINTON COOK.

Q. How long have you been living in Hampton? A. I have been off and on about nine years.

Q. You don't know the name of the dealer in Hampton?

Mr. MOREWITZ: He said Lewis.

A. I said Lewis in Hampton is all I know, fish dealer.

By Mr. JETT:

(34) I don't know how much Captain Fergusson got for the twenty barrels of fish he sold to Mr. Lewis in Hampton. And don't know how much twenty barrels of fish generally sell for, but I do know that the fish that were sold to Mr. Lewis were bad.

By the COURT:

Q. You said the fish were bad? A. Yes, sir.

Q. What was the matter with it? A. We had them too long and the ice was melted.

By Mr. JETT:

I don't know whether Captain Fergusson got anything for them or not. Captain Fergusson hasn't any money. I asked him for my money and he said he would give it to me when he got it. I didn't file any libel or take any steps to collect my money until after the libel of J. S. Darling was filed. I know Mr. Nye, the engine man, the gentleman who is now sitting in the court-room. I recall his coming aboard the "Dola Lawson" when we came in from North Carolina on one trip, he come most any time. I don't remember having any conversation with him with reference to how we were paid, I never discussed that with him.

Q. I am going to show by him that you did discuss it with him on that boat, you and the other man and Mr. Fergusson? A. No, sir.

Q. You don't recall that? A. No, sir.

By Mr. JETT:

Captain Fergusson worked on the "Dola Lawson" every trip, with the exception of about three trips, from

January 1, 1928, until May 14, 1928, the day she was libeled. Ruffin Collie took charge of the navigation of the boat during those three trips, I only handled the engine. Collie was hired to cook and work on deck. I tell the Court that when Captain Fergusson wasn't on board the cook took charge of the navigation of this ves-
(35) sel, after I had been on her papers as master in the past. Collie was employed somewhere about the middle of January, 1928, at Washington, North Carolina, in my preesnce. That was after the vessel had been taken off the railway in Hampton and send down to Washington, North Carolina. Collie left the "Dola Lawson" when she was tied up by the Marshal, I suppose he has gone home.

By the COURT:

Q. Where did he go, do you know? A. North Carolina, I think.

Q. At Washington where you hired him? A. I don't know. He said he lived in Washington, up in the western part of the state, I believe he said.

Q. Is he a married man? A. Not as I know of.

Mr. MOREWITZ: That is all the testimony. We want to introduce a notice that we sent down that we were ready to try this matter. With that, we rest.

Note: This paper was marked libelant's Exhibit No. 1.

(36) F. M. SINCLAIR, one of the repair lien claimants, sworn testified as follows:

Examined by Mr. JETT:

I live in Hampton, Virginia, and know the Powerboat "Dola Lawson". She is a trawl boat of about 120 tons capacity, equipped with a Mianus Diesel engine. Thomas B. Fergusson, the owner of this vessel, lives in Hampton, Virginia.

Q. Did you have any conversation with Mr. Fergusson on the day this vessel was libeled or shortly after she was libeled?

Mr. MOREWITZ: We object to any conversation he

may have had with the master of the boat. He is the respondent here and if there is any judgment there would be a recovery over against him and we certainly can't be a bound by anything he says.

The COURT: What are you going to attempt to prove?

Mr. JETT: I am going to attempt to prove that Capt. Fergusson said these men, every one, were employed on shares.

The COURT: I don't think you can prove it by this man.

Mr. MOREWITZ: You can prove statements my client might have made but he certainly can't prove any that Fergusson made.

By Mr. JETT:

Q. Mr. Sinclair, since January 1st up until the time this vessel was libeled on May 14th, had Fergusson been on that boat all the time or not? A. No, sir.

Q. What part of that time would you say, to the best of your belief, he was not on board?

Mr. MOREWITZ: I object to the best of his belief. If he knows, he can testify.

By the COURT:

Q. Tell us what you know about it? A. When the boat came back from North Carolina where she was fishing, Tom told me he couldn't go on the boat any more.

Q. Who is Tom? A. Mr. Fergusson told me that he couldn't go on the boat.

Mr. MOREWITZ: We object to this.

A. (Continuing) And, of course, I don't think Mr. Fergusson had been on the boat a trip since it came back from North Carolina.

By Mr. JETT:

Q. When was that? A. I couldn't tell you that—sometime in February or the first of March. I am not sure.

By the COURT:

Q. You don't know that definitely? A. I know he (37) hasn't been on it on several trips.

Mr. MOREWITZ: My client has testified he wasn't on her for three trips.

By Mr. JETT:

Q. Do you know who acted as master when he was not on board? A. I couldn't swear to that. I know this man has been accustomed to going as captain when Mr. Fergusson wasn't aboard.

The COURT: The man who owns the boat?

Mr. JETT: I don't know. He is the respondent in this case but evidently nobody represents him and he hasn't come in.

Mr. MOREWITZ: He was in the court room this morning and left.

Mr. JETT: I have never seen him.

Mr. KELSEY: Ask Mr. Sinclair if he has seen him. He knows him.

WITNESS: No, I haven't seen him.

By Mr. JETT:

Q. Mr. Sinclair, what is the custom over in Hampton as to the hiring of these seamen on trawl boats? Are they hired on wages or so much per month or hired on the percentage of the cash?

Mr. MOREWITZ: I object to that.

The COURT: I don't see how that makes any difference. It may have been the universal custom over there and not be true in this particular case. I don't think I can assume these men were hired on shares in the face of this man's positive statement to the contrary unless I have some evidence other than mere habit or custom.

CROSS EXAMINATION.

By Mr. MOREWITZ:

I have a claim against the "Dola Lawson". There

isn't anything unsual for a white man to be in charge of one of these boats while colored men are employed on her. There was nothing unusual about the white man being in charge of the boat. It would be rather out of the ordinary in Hampton for a colored man to be in charge of the boat with a white man under him.

By Mr. JETT:

I never knew Cook to go as master of the boat.

(38) CHARLES H. HEWINS, an employee of J. S. Darling & Son, the libellants who claim a repair lien, sworn and testified as follows:

I am connected with J. S. Darling & Son in Hampton. We have two small power boats about the size of the "Dola Lawson" and two large ones. These boats are engaged in oystering, they are not in the trawl fishing business. The men who work on them are all employed by the week, except the officers.

Q. How much do you pay seamen on those boats?

Mr. MOREWITZ: I object to that, if your Honor please. It is a question of what the contract was in this case.

The COURT: I don't think it makes any difference.

A. $15 a week and the grub bill.

By Mr. MOREWITZ:

Q. Capt. Hewins, it is nothing unusual in a case where a white man and colored man on board one of those boats in Hampton Creek for the while man to be in charge, is there, no matter what the knowledge of the negro is in reference to running the boat? A. It would be usual, I think, for a white man to be in charge.

CLINTON COOK, one of the petitioning seamen, recalled, testified as follows:

Examined by Mr. JETT:

I got my meals and lodging in addition to the wages that I was supposed to receive.

L. B. NYE, President of Nye, the engine man, Inc., one of the supply lien claimants, sworn testified as follows:

Examined by Mr. SIBERT:

My company furnished certain equipment for the "Dola Lawson" from time to time since January. On one of these times when I went aboard this boat, I had a conversation with Clinton Cook, the man who just tes-
(39) tified here, and the other seaman who has filed a libel and Mr. Fergusson, in reference to how these men were paid. That conversation was had in the presence of Mr. Fergusson and each of these other men. The subject wasn't particularly mentioned for any purpose at all. They were going, going from Hampton fishing at that time and I said "Well, I wish you good luck when you *do* down". He said "Yes, we hope so. It has been pretty bad and we don't get anything unless we make it".

By the COURT:

Q. Who said that? A. It was sanctioned by all three.

By Mr. SIBERT:

I don't know and wouldn't say which one of the men made that statement. Anyhow it was sanctioned by all three, that is, if they didn't make any catch they didn't make anything. They all sanctioned that if they had good fishing they would make good money and if they didn't catch any fish they wouldn't make any. That was the general discussion between all of them aboard the boat. The "Dola Lawson" was laying right close to my store near Anheuser Busch pier in Norfolk, she had come in here. I am the president of Nye, the engine man, Inc, and I am familiar with the supplies and repairs furnished to the "Dola Lawson". I have a statement here for the parts and repairs that I furnished to the "Dola Lawson" amounting to $380.27 and interest. $66.17 of the amount was furnished during 1927, the rest of it was furnished during the period from March 9, 1928 until May 9th, 1928. The item of May 9th was furnished while the vessel was on the Marine Railway at Hampton. The total for the supplies fur-

nished in March and May is $314.10, and this was furnished while she was on the Marine Railway in Hamp-
(40) ton.

By Mr. MOREWITZ:

I saw Captain Fergusson this morning, right here at the court-house door down the street. I spoke to Captain Fergusson with reference to this case.

Q. Did you make any effort to get him to come here to bear out your version? A. He said—

Q. I am not asking you what he said? A. Yes, he mentioned it, yes, sir.

Q. Did you ask him to come here to support your statement with reference to this share business? A. Yes, sir, I did.

Q. Did you have any difficulty in getting him to come here? A. No, sir.

Q. He isn't here now, is he? A. Not that I know of.

By Mr. JETT:

Q. What good did it do for him to come over if he wasn't going to stay for the hearing? You didn't ask him to leave, did you? A. I don't know. He said no need of him being here and he was going to attend to some other business.

CHARLES H. HEWINS. recalled, testified as follows:

Examined by Mr. JETT:

The amount of the J. S. Darling claim that I filed in these proceedings is $543.07 and interest claimed on $540.92 from November 4, 1927, and $2.15 from March 30, 1928. The invoice is for repairs done to the "Dola Lawson" at our railway, no part of which has been paid.

F. M. SINCLAIR, recalled, testified as follows:

Examined by Mr. JETT:

I run a machine shop in Hampton, Virginia and have filed a claim in these proceedings. The amount of my invoice against the "Dola Lawson" is $355.49. The

(41) last work that I did, was on the day before the vessel was libeled, the 10th of May, 1928. No part of my invoice has been paid.

By Mr. LITTLE:

My bill shows the date of the first item.

Mr. FORWOOD: I renew my motion that the matter be continued. I didn't have time to get my man over here. I think we can get some pertinent evidence on the question of this wage claim.

E. T. LAWSON, of E. T. Lawson & Son, one of the supply lien claimants, sworn testified as follows:

Examined by Mr. LITTLE:

My name is E. T. Lawson and I live in Hampton, Virginia. I am in the grocery and oil business and have from time to time furnished the "Dola Lawson" with provisions and necessary supplies. I have a statement of my account against this vessel, which is complete and shows the goods furnished, the dates furnished, the credits and the balance due, which totals $687.36 with interest, as shown by the statement that he herewith filed.

Mr. MOREWITZ: I understood Mr. Fergusson would be here. I have never had the pleasure of meeting the gentlemen and wouldn't know him if I saw him. I have a statement here under oath admitting these claims in the nature of an answer that was prepared in Hamp-
(42) ton and if he was here I would have no purpose in offering it. Inasmuch as he is not here, I offer it as evidence.

Mr. LITTLE: We object to it. It is in the form of an answer. He is a respondent personally as well as the vessel.

Mr. JETT: If that document is put in evidence we shall certainly want him here.

The COURT: I don't think you can introduce that.

Mr. MOREWITZ: In this he says that the statements of account are correct with the exception that he paid these men $40 apiece.

The COURT: I rule the paper out but I don't see any-

thing to do but allow these wages unless I have some evidence and I haven't heard any.

Mr. JETT: We certainly haven't had any evidence as to the other man's wages.

The COURT: No.

Mr. JETT: We certainly should object to that being allowed under this testimony this morning.

Mr. MOREWITZ: This man Cook has testified the man was employed at $100 a month.

The COURT: We don't know whether he has been paid.

Mr. MOREWITZ: In the first place, this proceeding is a little irregular in that they have not filed any objection to these claims.

The COURT: That doesn't make any difference. I require every claim to be proved anyhow.

Mr. MOREWITZ: We have filed a libel. When they plead payment or want to prove payment, they have to put evidence on. All we have to show is he was em-
(43) ployed. The burden of proof is on them even at common law.

The COURT: I don't know any rule of that kind anywhere. It does seem remarkable to me that these men, if they were to be paid wages, if that is honestly a fact, should have gone from January to May without a dollar of pay and rather strengthens the suggestion that they weren't working for wages but were working in a partnership but I can't say that is a fact in the face of this colored man's positive statement and in the absence of anything to the contrary I feel obliged to accept his statement and give him his wages but I want proof before I allow the other man's wages.

Mr. MOREWITZ: We will have him here before there is any disposition of the funds.

(44) **STATEMENT OF THE EVIDENCE BEFORE HONORABLE D. LAWRENCE GRONER, UNITED STATES DISTRICT JUDGE, AT NORFOLK, VIRGINIA, JUNE 12, 1929.**

Narrative filed in Clerk's Office, December 19, 1928.

Present: Messrs. Kelsey & Jett for the libelant, Darling & Son, and petitioners Sinclair, Williamson

and Council; Mr. H. H. Little for E. T. Lawson & Son; Mr. Walter Sibert for Nye, the Engineman, Inc.; Mr. J. L. Morewitz for the petitioning seamen; Mr. Samuel E. Forwood for Johnson & Corkran.

RUFFIN COLLIE, one of the petitioning seamen, sworn, testified ao follows:

I was employed on January 15, 1928, by Captain Fergusson to go as a cook and work about the deck on the "Dola Lawson". This took place while she was lay ng at Washington, North Carolina, and my wages were to be $100.00 per month. I continued working on this vessel from that time until the Marshal took charge of her on May 14, 1928, but only received $25.00 on account of my wages, for the half-month I worked in January, 1928, as shown in my petition. Captain Fergusson was drinking a great deal of the time and always told me he had no money when I asked him for my wages. Clinton Cook and myself worked four nights extra, for which Captain Fergusson agreed to pay us, each, $5.00 a night, but neither Cook nor myself received any part of the wages due us, and claimed in our libel, though we both asked Captain Fergusson for the money coming to us on several occasions. We knew he had been in hard luck and he was feeding us and giving us a place to sleep. Both Clinton Cook and myself were working on straight wages. We had an understand-
(45) ing that if the vessel paid more than our wages and her other expenses, we would get a bonus out of what was left over, but we never got anything, except that I received the $25.00 as a part of the $50.00 due me for the time I worked in January. We did our fishing on the ocean off the Virginia and North Carolina coasts. The "Dola Lawson" was entered in the Custom-House as a Coastwise Vessel and Captain Fergusson, the owner, was her master, the ship's papers showing that he was both owner and master. This vessel is licensed to carry on the Coasting Trade and actually traded between Hampton, Virginia, and Washington, North Carolina, at times calling at other ports in Virginia, North Carolina and Maryland to deliver fish and to take on ice, food, fuel and other supplies.

By Mr. KELSEY:

Neither Clinton Cook nor myself worked on a share basis. We were hired at straight wages and no change was ever made in the arrangements we each had with Captain Fergusson. I never did work on shares. I looked to the "Dola Lawson" for my wages. If she had not been libelled I believe that Captain Fergusson would have been able to pay everybody that has a claim against her, as she was just beginning to earn good money when her crank-shaft broke. That ruined everything and on top of it all the boat was libelled. Captain Fergusson kept on promising to pay Cook and me, when we asked him for our money. He told us that he was paying for the food we were eating as well as the oil and supplies for the boat out of the money he was getting for the fish and we knew that he had a lot of personal bills to pay. I don't know just what prices he got for the fish we caught, but he couldn't have gotten much as we didn't catch very many and sometimes they would go bad on us because of the ice melting before we could (46) get back to port. I never told Nye, the engineman, that we were working the "Dola Lawson" on shares and never heard any such matter discussed in my presence, either by Mr. Nye or anyone else.

Examined by the COURT:

Since the "Dola Lawson" was tied up by the Marshal on May 14, 1928, I have been unable to get anything else to do, though I have tried. I have been living with my father, near Washington, North Carolina, but he has nothing for me to do.

CAPTAIN THOMAS D. FERGUSSON, the respondent owner of the "Dola Lawson", sworn as an adverse witness, testified as follows:

Examined by Mr. KELSEY:

There never was anything said between Collie and Cook and myself about their working on shares. The claims asserted by Ruffin Collie and Clinton Collie in their intervening libel are correct. They worked for straight wages, as I was unable to ever get anyone to

work the "Dola Lawson" on a share basis. I agreed to give these men $5.00 a *peice* for each night they worked extra and they have $20.00 each due them on that account.

CROSS EXAMINED.

By Mr. MOREWITZ:

I started out to fight the Darling libel, but after taking the matter up with Mr. Little found out that it was not worth while to do so. Collie and Cook earned the wages they are claiming. I would have been able to pay them if the crank-shaft on the engine had not broken and if the boat had not been libelled immediately thereafter. What litte money I collected was paid (47) out on my old bills and it is true that I also had been drinking. The signature you show me on my formal Answer (Introduced as an exhibit on behalf of Collie and Cook at the hearing on June 8, 1928) is my signature and I swore to this Answer before a Notary Public. Since hearing the testimony of Ruffin Collie today my memory has been refreshed and it is true that the amounts claimed by Collie and Cook in their libel are correct. The "Dola Lawson" is licensed for and at all times was engaged in the Coastwise Trade, both as an oil carrier and while fishing. I have been her master ever since I put her in the fishing business.

At a later date, to-wit, on July 16, 1928, CAPTAIN FERGUSSON was recalled as a witness for the supply and repair lien claimants and testified as follows:

Examined by Mr. KELSEY:

Robbie Rowe worked with me on the "Dola Lawson" on a share basis and when he quit I paid him off. I don't remember what he had coming to him.

CROSS EXAMINED.

By Mr. MOREWITZ:

I did not have any words or any argument with Rowe, but he just quit. All the men working on the "Dola Lawson" were white men at that time. It is true that I had difficulty in keeping white men on her as she

is not a regular fishing vessel. I had used her in the oil business working for the Texas Oil Company. When I lost that job I thought I would make a fishing vessel out of her, but soon found out that she was not suitable for that sort of work as she was not quite large enough. She was a "Licensed Vessel Under 20 Tons" but has always been engaged in the "Coastwise Trade" ever since I owned her; calling at ports in Virginia, North Carolina and Maryland while she was in the fish business.

(48) **DEPOSITIONS TAKEN AUGUST 4, 1928, ON BEHALF OF ROBBIE ROWE.**

Narrative Filed in Clerk's Office, December 19, 1928.

ROBBIE ROWE, one of the petitioning seamen, sworn, testified as follows:

Examined by Mr. MOREWITZ:

My name is Robbie Rowe. The "Dola Lawson" and Captain Thomas D. Fergusson owe me One Hundred and Forty-Five Dollars for wages. I have been going to sea for nine years, am twenty-seven years old, but cannot read or write. Captain Fergusson employed me to go fishing on the "Dola Lawson" at Twenty-Five Dollars a week, while we were both standing near the First National Bank Building, in Hampton, Virginia. Carl Ward (indicating the person referred to) was also present when I was employed. I worked on the "Dola Lawson" for six weeks, but was not paid at the end of each week because Captain Fergusson claimed he just didn't have the money. He had the money so far as I know, but spent it. I wanted some money the third week I was on the "Dola Lawson" and asked Captain Fergusson for it and he didn't have it; he gave me Five Dollars then. He drank all the money up. Captain Fergusson was never sober from the time I went on board his boat until I left. That is what made the row,—his going aboard drunk and wanting me to go to sea with the "Dola Lawson". The first week was up on Friday,—I went out on a Friday and the six weeks would have been up on Saturday. I asked Captain Fergusson for the money when the last week was up, on a Friday. When

I went to him on that last Friday he did not offer to pay me, as he was so drunk he could not settle, and went to him on Saturday morning he was very drunk; he had wasted the money. He told me that he didn't have the money, that he had wasted it. He had been paid by the (49) fish-packer on that Thursday for the fish we caught and came down to the vessel drunk on the next day, Friday. Captain Fergusson did not have a cent when he came down and has not offered to pay me anything since that time, though I have seen him since then about my wages. After he testified before the Court in this case in Norfolk Captain Fergusson came to me one day at the dock and told me he wanted to compromise with me; that he had promised to pay me, but didn't have the money, and wouldn't I compromise with him. He said he had turned the money in, and wanted to know if I would not let it go. I told him "No, I would not". He said he had told in Court that he had paid all the money out and didn't owe anybody; and wanted to compromise with me. I told him I would not do that. He said that it would ruin him. I don't know how many days it was after he had been to Norfolk to testify that he came to me and asked me if I would not compromise with him, and I told him "no". At that time he was as sober as I am this morning.

CROSS EXAMINATION.

By Mr. FORWOOD:

I went to work on this boat on the 1st of September, 1927, and worked six weeks, when I quit on Friday, after we had the trouble. Captain Fergusson was to give me $25.00 a week. Whether he made a cent or whether he didn't make anything, he was to pay me $25.00 a week. I was *suppose* to run the engine and fish the nets on the "Dola Lawson". She was fishing down off the Southern Beach, near Cape Henry. During the six weeks I was on the boat we spent most of the time fishing. We would leave in the morning and stay a day or a night before we came back. Get the fish a day or night before we came in. I cannot tell exactly how many trips we made. The (50) week that Captain Fergusson and I had the trouble, we sold the fish that we caught for a little over $800.00. That was the last week we went out on the

ocean to fish. Captain Fergusson came to town in the morning, and had the trouble, and the fish had been sold and I know he had the money. We never had gotten as much as that before; that was the best week we ever had. The average for the other weeks was not very much. I guess around two or three hundred dollars, something like that. I know that we caught $2,000.00 worth of fish during the time that I was on the boat. I don't know exactly what amount of fish the boat would have to catch, for me to get anything above $25.00 a week. Captain Fergusson told me he would guarantee $25.00 a week, you see, and if he made anything like he ordinarily should he would give me more. He didn't say how much. He just told me he would give me more, just to go on board. I had never worked with him before. I talked to Captain Fergusson at the cross streets in Hampton. He saw that I was home, idle at the time and knew that I had been fishing a lot before. I did not get my $25.00 a week during any of these weeks, I only got $5.00 in the six weeks, that is all I got, on that Friday, and when I quit I didn't have money enough to go home on. I made a demand on Captain Fergusson for the money he owed me. I thought we were going to get a big catch of fish and therefore *keep* on working. He refused to pay me but I kept on working for him because I left it to the man's honesty. I knew the fish were going to hit the Southern beach and I knew the catch would be good, and knew that they always got good prices for them, and I (51) kept on working for him. Captain Fergusson had had bad luck and all that sort of thing, and was way behind, I guess I would help any man who was in bad luck, I would wait on any man. If he had not had that big catch of fish we caught the last week, I intended to get my money out of the boat. I was never supposed to get a portion of the catch. I was supposed to get $25.00 a week for each week, that was the agreement. I knew that he was drunk all the time, but continued to work for him. I knew he had the money, I didn't have any money, and I got $5.00 to go home on. I never saw him sober but once the whole time I was on the "Dola Lawson". I knew he was drinking, but as to where he was getting it from I didn't know. Of course, Captain Fergusson was way behind and had been fishing once before and failed on that, and he came to me and asked

me would I go fishing with him there again. Fishing was always good on the Southern beach and he would make a few dollars. He did not make any promise that he would pay me when he did get this big catch, but he and I were expecting sometime to make a good catch and I knew that, as I had been fishing for nine years. Captain Fergusson was absolutely wrong if he testified that I was working on a division of the catch basis, as I never worked that way, I worked on wages. Carl Ward (indicating) sitting right over here was present when I made the agreement with Captain Fergusson. I left this boat sometime in October, 1927. I didn't bring any action against Fergusson between that time and the time the boat was libeled because I just gave the man time, that is why, just giving him time to pay. I still had confidence enough in the man to think he would pay me, and (52) I thought he would pay me. And he did tell me that he would pay me if he ever made the money, he told me them words. Captain Fergusson and I were right at the Hampton dock when we had the conversation about his wanting to compromise my claim. I could not tell you to save my life how he came to tell me that. We met down there on the dock and he called me off to one side and asked me would I compromise with him. I told him No, I would not, that I had worked for the money and I ought to have it. And he said "You have ruined me, I have been over there and sworn that I didn't owe you or a human being except the two boys that was on there." I said "Well, Tom, I can't help that, I have got to have my money".

RE-DIRECT EXAMINATION.

By Mr. MOREWITZ:

There was only one other man on this boat outside of Captain Fergusson and myself. At times there were three different ones on. He *feed* us all of that time. We were hired men and were not supposed to buy a thing. We didn't have to buy a thing in the world, not a thing. We were all hired men.

CARL WARD, a witness on behalf of Robbie Rowe, sworn, testified as follows:

ROBBIE ROWE.

Examined by Mr. MOREWITZ:

I am twenty-six years old. I have been going to sea about five years; I have been fishing all my life, every day. I was present when Captain Fergusson hired Robbie Rowe, near by the Merchants National Bank, on the cross streets in Hampton. Captain Fergusson agreed (53) with Robbie Rowe to pay him $25.00 a week and might be paid more if he made it. $25.00 a week any ways. There was nothing said about commissions as I know of. Nothing was said about commissions in my presence.

CROSS EXAMINATION.

By Mr. FORWOOD:

Robbie Rowe was to get more than $25.00 a week if they made it. I can't tell you how much Captain Fergusson would have to make before Robbie Rowe was to get anything more than $25.00; but if they didn't make a cent the whole week Robbie Rowe was to get $25.00 a week, he was on wages. Captain Fergusson came there and told Robbie Rowe that he was in hard luck and wanted Robbie Rowe to go out with him and he would guarantee him $25.00 a week, whether he made a cent or not, and if he made more he would pay him more. That is all I know, we are naturally friends together, and I happened to be in town with him that day. I don't know what Captain Fergusson meant by that "more if he made it", I don't know how much more he would have to make. That is all I know. I was not interested at all.

By Mr. MOREWITZ:

He did not hire anybody else at the same time I know of.

ROBBIE ROWE, one of the petitioning seamen, recalled, further testified as follows:

By Mr. MOREWITZ:

The other men working on the boat were getting the same amount that I was, $25.00 a week, and were doing the same kind of work as myself. I was running the (54) engine and fishing and the other guy was cooking and working on deck. There was two on deck.

By Mr. FORWOOD:

Captain Fergusson did not pay these other men a cent. I have been knowing Tom Fergusson a right good while. I say I had known him, I knew him when I met him, and that was all, you see. How come me to get acquainted with Mr. Fergusson—first knowledge, you see, was when he started up fishing, the Captain I am working under now, he helped him to fit his boat up and told him how to fish, and it was through him I got acquainted with him. And he hired another man who was on the boat, and carried him over to Chincoteague, and worked him two weeks and never paid him a cent. Charley Furr and Tom Fergusson were the only men who were on the boat prior to the time that I was on it. When I left a colored fellow that had been working on the "Dola Lawson" when she was running oil for the Texas Oil Company, was working on her. That was before they started fishing with the "Dola Lawson", and they ruined it, the boat, and cut out the oil business.

By Mr. MOREWITZ:

I know a man by the name of Routten. He was an old gentleman who was on the "Dola Lawson" while I worked on her. I don't know anything about his arrangements with Captain Ferguson. He came on board her after I did. I don't know whether he was paid or not.

(55) (EXHIBIT.)

ANSWER TO THE INTERVENING PETITION OF RUFFIN COLLIE AND CLINTON COOK, WHO SUE UNDER THE REVISED STATUTES OF THE UNITED STATES PERMITTING SEAMEN TO SUE FOR THEIR WAGES AND TO ENFORCE LAWS MADE FOR THEIR HEALTH AND SAFETY, WITHOUT SECURITY OR PREPAYMENT.

Filed June 8, 1928.

To the Honorable D. Lawrence Groner:

Your respondent, reserving unto himself all other rights that he may or might have under and by virtue of the above libel and interventions, does hereby on his oath, state as follows:

1. Replying to Paragraph 1 of the above petition, your respondent would state that the time of employment and pay per month is true, but that he did, on two occasions, pay the seamen $10.00 each, on another occasion $15.00, on yet another occasion $5.00, and on another occasion purchased a pair of boots to the value of $4.50, making a total of $44.50, to which he is entitled credit thereupon, and instead of owing and be indebted to Ruffin Collie, in the sum of $375.00, as set forth in Paragraph 5 of the petition, he is only indebted and liable to the amount of $355.50.

2. As to Clinton Cook, instead of being indebted to the sum of $320.00, because he did on two occasions give Cook $10.00, one occasion $5.00, and on another occasion $15.00, making a total of $40.00 credit to which he is entitled, but to which they have not stated they did receive.

All the other alligations in the petition are true except as to the corrections of the amounts, which were paid in cash by him.

(56) THOMAS D. FERGUSSON,
Master of the Power Boat "Dola Lawson", and owner thereof.

Sworn to and subscribed to before me this 31st day of May, 1928.

E. RALPH JAMES,
Notary Public.

During cross examination of defendant, Thos. D. Fergusson on July 16, 1928, at an adjourned hearing, the above papers, signatures & oath were identified by him.

P. J. RILEY, JR.,
Deputy Clerk.

(57) **LIBELLANTS EXHIBIT NO. 1.**

JACOB LOUIS MOREWITZ
Attorney and Counselor at Law
Newport News, Virginia.

May 15, 1928.

Clerk,
U. S. District Court,
Post-Office Building,
Norfolk, Va.

Re: Darling v. Power Boat "Dola Lawson", et al. Libel and Petition of Collie & Cook for Seamen's Wages, etc.

Dear Sir:

I am transmitting to you herewith for filing the petition of Ruffin Collie and Clinton Cook, who were employed as seamen on board the above vessel. Please issue process thereon at your earliest convenience.

Inasmuch as the claims set up by these two seamen are entitled to priority in the distribution of what may be realized from the sale of the above vessel and also involve waiting time under the provisions of R. S. 4529, as amended, I would appreciate it if you would call the matter to the attention of Judge Groner and the proctors for the other lienors, so that an order of sale might be entered immediately and the proceeds distributed without any undue delay, in line with the prayer of the petition now being filed on behalf of my clients.

Thanking you in anticipation, I am

Yours very truly,

JLM/M J. L. MOREWITZ.

CC—Messrs. Kelsey & Jett, &
Walter Sibert, Esq.,
Attorney at Law,
Norfolk, Va.

(58) **LIBELLANTS EXHIBIT NO. 2.**

JACOB LOUIS MOREWITZ
Attorney and Counselor at Law
Newport News, Virginia.

June 22, 1928.

Messrs. Kelsey & Jett,
Attorneys at Law,
Citizens Bank Building,
Norfolk, Virginia.

Messrs. Hughes, Little & Seawell,
Attorneys at Law,
Law Building,
Norfolk, Virginia.

Samuel F. Forwood, Esq.,
Attorney at Law,
Bank of Commerce Building
Norfolk, Virginia.

Walter Sibert, Esq.,
Attorney at Law,
Royster Building,
Norfolk, Va.

Re: Darling v. Power Boat "Dola Lawson" and/or Thomas D. Fergusson, Intervening Petition of Robbie Rowe, former Engineer.

Gentlemen:

Inclosed herewith you will please find a copy of the intervening petition that I am filing on behalf of Robbie Rowe, a former member of the crew of the above vessel. Inasmuch as the amount realized from the sale of this power boat is now in the registry of the Court, I am anxious to have Judge Groner pass on the claims asserted in the instant petition, so that a decree distributing the fund might be entered at the earliest possible moment.

I made tentative arrangements yesterday with Judge Groners secretary, Mr. Jackson, for a hearing today, but as Mr. Jett desired to summons witnesses, the matter had to go over. However, I trust that it will be convenient for all the proctors interested to have the matter disposed of sometime next week, and would appreciate your getting in touch with Mr. Jackson with that end in view.

Please acknowledge receipt of this letter and advise me what day, if any, has been set for the hearing on these claims.

Yours very truly,

JLM/PH J. L. MOREWITZ.

(59) **LIBELLANTS EXHIBIT NO. 3.**

JACOB LOUIS MOREWITZ
Attorney and Counselor at Law
Newport News, Virginia.

July 3, 1928.

Messrs. Kelsey & Jett,
Attorneys at Law,
Citizens Bank Building,
Norfolk, Virginia.

Messrs. Hughes, Little & Seawell,
Attorneys at Law,
Law Building,
Norfolk, Virginia.

Samuel F. Forwood, Esq.,
Attorney at Law,
Bank of Commerce Building,
Norfolk, Virginia.

Walter Sibert, Esq.,
Attorney at Law,
Royster Building,
Norfolk, Virginia.

Re: Darling v. Power Boat "Dola Lawson" and/or Thomas D. Fergusson.

Gentlemen:

On the assumption that there will be no contest in regard to the claim of Robbie Rowe, a copy of whose petition was forwarded you on June 22nd, 1928, I have drafted a form of decree distributing the proceeds of the sale. If Judge Groner finally concludes to allow the three seamen, whom I represent, 'waiting time' under R. S. 4529 there will, of course, be nothing left for the other claimants. In that event, the form of decree will have to be redrafted to carry out the views that Judge Groner might arrive at.

In the meantime, a copy of the present draft is being forwarded you for such comment and objections as you might care to make in regard thereto. You will note that I have proceeded on the theory that all claims more than a year old are not eligible to participate in the distribution, but are merely personal claims against the owner.

Yours very truly,

JLM/PH J. L. MOREWITZ.

(60) **LIBELLANTS EXHIBIT NO. 4.**

JACOB LOUIS MOREWITZ
Attorney and Counselor at Law
Newport News, Virginia.

July 9, 1928.

Messrs. Kelsey & Jett,
Attorneys at Law,
Citizens Bank Building,
Norfolk, Virginia.

Messrs. Hughes, Little & Seawell,
Attorneys at Law,
Law Building,
Norfolk, Virginia.

Samuel F. Forwood, Esq.,
Attorney at Law,
Bank of Commerce Building,
Norfolk, Virginia.

Walter Sibert, Esq.,
Attorney at Law,
Royster Building,
Norfolk, Virginia.

Re: Darling v. Power Boat "Dola Lawson" and/or Thomas D. Fergusson.

Gentlemen:

Since writing you on July 3rd, I have revamped the last three pages of the draft of the decree which I am submitting to Judge Groner and beg to inclose herewith carbon copies of the said pages numbered four, five and six.

Should you have any objection to the decree as now drawn, I would appreciate your advising me of same by return mail. In any event, please acknowledge receipt of this letter, as I am anxious to have the matter disposed of without any further delay, in view of the fact that Judge Groner is shortly leaving for his vacation.

Trusting that you will let me hear from you promptly I am

Yours very truly,

JLM/PH

J. L. MOREWITZ.

(61) **LIBELLANTS EXHIBIT NO. 5.**

JACOB LOUIS MOREWITZ
Attorney and Counselor at Law
Newport News, Virginia.

August 2, 1928.

Messrs. Kelsey & Jett,
Attorneys at Law,
Citizens Bank Building,
Norfolk, Virginia.

Messrs. Hughes, Little & Seawell,
Attorneys at Law,
Law Building,
Norfolk, Virginia.

Samuel F. Forwood, Esq.,
Attorney at Law,
Bank of Commerce Building,
Norfolk, Virginia.

Walter Sibert, Esq.,
Attorney at Law,
Royster Building,
Norfolk, Virginia.

Re: Darling v. Power Boat "Dola Lawson" and/or Thomas D. Fergusson, Intervening Petition of Robbie Rowe, former engineer.

Gentlemen:

Inclosed herewith you will please find a copy of the notice to take depositions on behalf of Robbie Rowe in the above matter.

At the last hearing Judge Groner directed that the above petitioner's depositions be taken on twenty-four hours notice and transmitted to him. Since that time I have endeavored to arrange for the taking of this evidence with Messrs. Kelsey and Jett, but for one reason or another we have been unable to get together on the fixing of a date.

In view of the money being tied up in the registry of the Court I am anxious to get the final decree entered without any further delay and would appreciate your co-operation in getting the matter disposed of.

I trust that you will favor me by acknowledging receipt of this letter by return mail.

Yours very truly,

JLM/PH J. L. MOREWITZ.

(62) **LIBELLANTS EXHIBIT NO. 6.**

JACOB LOUIS MOREWITZ
Attorney and Counselor at Law,
Newport News, Virginia.

August 17, 1928.

Honorable D. Lawrence Groner,
Judge, U. S. District Court,
Post-Office Building,
Norfolk, Virginia.

Re: Darling v. Power Boat "Dola Lawson" and/or Thomas D. Fergusson.

Dear Judge:

The deposition of Robbie Rowe has just been delivered to me, and, pursuant to your direction, the same is herewith being transmitted to you, along with the draft of a decree which is objected to by the proctors for the repair and supply lien claimants. I understand that they will submit another draft, which, insofar as it conflicts with the inclosed, is objected to by me.

In preparing the attached draft I have endeavored to follow what I understood your Honor's conclusions to be. On the assumption that Robbie Rowe's claim would be allowed, I have provided therein that he should recover the amount of wages proven to be due him. The concluding paragraph directs that the checks covering the costs ordered to be paid and the wage claims should be delivered to the respective parties forthwith and I trust that the form and substance of the whole draft will meet with your approval.

My clients have been without their wages for some little time, and I hope that the decree will be entered at the earliest possible moment, so that the checks might be prepared and forwarded for your Honor's signature.

Most respectfully,

JLM/PH J. L. MOREWITZ.

CC—Messrs. Kelsey & Jett,
Messrs. Hughes, Little & Seawell,
Samuel F. Forwood, Esq.,
Walter Sibert, Esq.,
Norfolk, Virginia.

(63) (EXHIBIT)

DRAFT OF FINAL DECREE ASKED FOR BY REPAIR AND SUPPLY LIEN CLAIMANTS.

Submitted August 20, 1928.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

F. W. Darling and J. S. Darling, trading as J. S. Darling and Son, Libellants,
v.
The Power Boat "Dola Lawson" and Thomas D. Fergusson, Owner.

In Admiralty.
No. 4809.

This cause came on this day to be again heard on the pleadings and proof, the decree of sale entered herein on June 2nd, 1928 and the Marshal's Report of sale filed on June 20th, 1928, and was argued by counsel.

On consideration whereof, it appearing to the Court from the report of Clarence G. Smithers, United States Marshal, filed herein that pursuant to the decree entered herein on June 2nd, 1928, and in accordance with the terms thereof, the said United States Marshal has sold the Power Boat "Dola Lawson", to E. T. Lawson and H. L. Corkran for the sum of Sixteen Hundred and Fifty Dollars ($1,650.00) cash, which sum has been paid into the registry of the Court of the credit of this cause, the Court doth approve and confirm the said report.

And the Court having, on June 12th, 1928, found, from the evidence heard in open Court, that Ruffin Collie was entitled to recover of and from the Power Boat "Dola Lawson" and/or Thomas D. Fergusson, her owner, the full amount of his wages, as claimed in his libel and petition, to-wit, the sum of Three Hundred and (64) Ninety-Five ($395.00) Dollars, together with interest on his said wages, as the same became due and payable and has a prior lien against the above proceeds of sale for said sum and interest, it does so ADJUDGE, ORDER AND DECREE.

And the Court having, on June 8th, 1928, found, from the evidence heard in open Court, that Clinton Cook was entitled to recover of and from the Power Boat "Dola Lawson" and/or Thomas D. Fergusson, her owner, the full amount of his wages, as claimed in his libel and petition, to-wit, the sum of Three Hundred and Eighty Dollars ($380.00), together with interest on his said wages, as the same became due and payable, and has a prior lien against the above proceeds for sale for said sum and interest, it does so ADJUDGE, ORDER AND DECREE.

And it appearing to the Court, after hearing the evidence of Respondent Fergusson, who testified as an adverse witness on behalf of the repair and supply lien claimants, that Robbie Rowe, one of the petitioners herein has not established his claim, and that therefore the same should be denied, it does so ADJUDGE, ORDER and DECREE.

And the Court being of the further opinion that F. W. Darling and J. S. Darling, trading as J. S. Darling and Son, are entitled to recover of and from the said Power Boat "Dola Lawson" the sum of Twenty-Seven Dollars and Twenty-One Cents ($27.21), with interest thereon from March 30th, 1928, until paid, for certain supplies or other necessaries furnished to said Power Boat within a year prior to May 14th, 1928, the date that this suit was instituted, and are entitled to recover the balance of their claim amounting to Five Hundred and Fifteen Dollars and Eighty-Six Cents ($515.86) with interest thereon from May 11st, 1927, in addition to such portion of their said prior claim as is not paid in full, from the said Thomas D. Fergusson, it does so ADJUDGE, ORDER and DECREE.

(65) And the Court being of the opinion that Nye, The Engine Man, Incorporated, is entitled to recover of and from the said Power Boat "Dola Lawson" the sum of Three Hundred and Twenty-One Dollars and Seventy-One Cents ($321.71) with interest thereon from May 9th, 1928, until paid, for certain supplies and other necessaries furnished to said Power Boat "Dola Lawson" within a year prior to May 14th, 1928, the date that this

suit was instituted and is entitled to recover the balance of its claim, amounting to Fifty Eight Dollars and Fifty-Six Cents ($58.56), with interest theron from April 14th, 1927, in addition to such portion of its said prior claims as is not paid in full, from the said Thomas D. Fergusson, it does so ADJUDGE, ORDER and DECREE.

And the Court being of the further opinion that S. M. Sinclair is entitled to recover of and from the said Power Boat "Dola Lawson" the sum of Ninety-Nine Dollars and Thirty-One Cents ($99.31), with interest thereon from May 10th, 1928, until paid, for certain supplies and other necessaries furnished to the said Power Boat, within a year prior to May 14th, 1928, the date that this suit was instituted and is entitled to recover the balance of his claim, amounting to Two Hundred Fifty Six Dollars and Eighteen Cents ($256.18), with interest thereon from April 23rd, 1927, in addition to such portion of his prior claim as is not paid in full, from the said Thomas D. Fergusson, it does so ADJUDGE, ORDER and DECREE.

And the Court being of the opinion that E. T. Lawson and I. E. Lawson, partners trading as E. T. Lawson and Son, are entitled to recover of and from the said Power Boat "Dola Lawson" the sum of Five Hundred and Ninety Two Dollars and Twenty-Eight Cents ($592.28), with interest thereon from May 12th, 1928, until paid, for certain supplies or other necessaries furnished to said Power Boat within a year prior to May 14th, 1928, the date that this suit was instituted, and are entitled to recover the balance of their claim amounting to Ninety Five Dollars and Eight Cents ($95.08) with interest thereon from April 26th, 1927, in addition to such (66) portion of their said prior claim as is not paid in full, from the said Thomas D. Fergusson, it does so ADJUDGE, ORDER and DECREE.

And the Court being of the further opinion that W. J. Williamson, trading as Williamsons', is entitled to recover of and from the said Power Boat "Dola Lawson" the sum of Thirty Dollars and Forty-One Cents ($30.41), with interest thereon from March 27th, 1928, until paid, for certain supplies or other necessaries fur-

nished to said Power Boat within a year prior to May 14th, 1928, and is entitled to recover such portion of his said prior claim as is not paid in full, from the said Thomas D. Fergusson, it does so ADJUDGE, ORDER and DECREE.

And the Court being of the opinion that L. Johnson and H. L. Cockran, partners trading as Johnson and Corkran, are entitled to recover of and from the said Power Boat "Dola Lawson", the sum of Four Hundred and Twenty-Three Dollars and Fifty Cents ($423.50), with interest thereon from July 16th, 1927, until paid, for certain supplies or other necessaries furnished to said Power Boat within a year prior to May 14th, 1928, the date that this suit was instituted, and are entitled to recover such portion of their said prior claim as is not paid in full, from the said Thomas D. Fergusson, it does so ADJUDGE, ORDER and DECREE.

And the Court being of the further opinion that J. V. Bickford is entitled to recover of and from the said Power Boat "Dola Lawson", the sum of Forty Two Dollars and Twenty-Five Cents ($42.25) with interest thereon from April 30th, 1928, until paid, for certain supplies or other necessaries furnished to said Power Boat within a year prior to May 14th, 1928, the date on which this suit was instituted, and is entitled to recover such portion of his said prior claim as is not paid in full, from the said Thomas D. Fergusson, it does so ADJUDGE, ORDER and DECREE.

And it appearing that the claim of J. C. Council, in (67) the sum of Ninety Dollars and Thirty-Five Cents ($90.35), with interest from April 2nd, 1927, against the said Power Boat "Dola Lawson" and/or Thomas D. Fergusson, for certain supplies or other necessaries furnished to said Power Boat, did not accrue within one (1) year prior to May 14th, 1928, the date on which this suit was instituted, and that therefore said claim is not entitled to share in the aforesaid proceeds of sale now in the registry of the Court, but that said J. C. Council is entitled to recover the amount of said claim of and from only the said Thomas D. Fergusson, it does so ADJUDGE, ORDER and DECREE.

And it appearing to the Court that after the payment in full of the amounts recovered by said seamen as wages, there will not be sufficient to pay in full the claims of other maritime lien claimants, and the Court being of the opinion that the contract of employment between the respondent Fergusson, owner of said Power Boat "Dola Lawson", and the said seamen is in the nature of a hiring at will, which could have been terminated at any time by either party, and being further of the opinion that said employment might have been terminated by said seamen at any time during the course of the same and a claim made for penalties under said section, but that they permitted said employment, without taking action to recover said wages or penalties, to run on for such length of time until the wages along practically amounted to the sale value of said Power Boat, and that the other maritime lien claimants should not be required to suffer by reason of the delay of said seamen in enforcing their claim for penalties, it is ORDERED by the Court that the claims of the seamen petitions for penalties under Section 4329 R. S. U. S., be and the same hereby are disallowed.

And it further appearing that there is now on deposit in the Norfolk National Bank of Commerce and Trusts to the credit of this cause the sum of Sixteen Hundred and Fifty Dollars ($1,650.00), the proceeds of sale of said vessel, and that, except as to the claims for (68) earned wages, together with accumulated interest thereon, which constitutes prior liens against the same, the said fund is insufficient to pay all the allowed lien claims, with costs, in full, and that the same should be distributed as hereafter set out, to-wit, to the claimants of seamen's wages the full amount of their earned wages and interest, as aforesaid, and to the other lien claimants who extended credit to the said vessel within one year prior to May 14th, 1928, the date on which this suit was instituted, .299459+ of their respective lien claims, as hereinabove set forth, the Court doth further AD-JUDGE, ORDER and DECREE that the Clerk of the Court do draw his checks, on the Norfolk National Bank of Commerce and Trusts, out of the fund now in the registry of the Court to the credit of this cause, in favor of the following parties in payment of the sums set op-

posite their respective names, said checks to be countersigned by the Judge of this Court and to be as follows, to-wit:

To J. L. Morewitz, proctor for Ruffin Collie:	402.57
To Clarence G. Smithers, United States Marshal, for Marshal's fees:	38.78
To Virginian-Pilot Publishing Company for advertising bills:	19.08
To Phlegar & Tilghman for stenographer's fees:	15.00
To J. S. Darling & Son, for guard hire:	92.50
To Kelsey & Jett, taxed proctor's fee:	10.00
To J. L. Morewitz, proctor for Ruffin Collie:	402.57
Carried Forward:	$632.53
Brought Forward:	$632.53
To J. L. Morewitz, proctor for Clinton Cook:	387.95
To Kelsey & Jett, proctors for J. S. Darling & Son	12.34
To Walter Sibert, proctor for Nye The Engine Man, Incorporated:	129.93
(69) To Kelsey & Jett, proctors for S. M. Sinclair:	40.92
To Hughes, Little & Seawell, proctors for E. T. Lawson & Son:	236.93
To Kelsey & Jett, Proctors for W. J. Williamson:	13.61
To Henry Bowden & S. E. Forward, proctors for Johnson & Corkran:	178.15
To J. W. Bickford:	18.24
	$1,650.00

And it appearing to the Court, from statements made in open Court by the proctors for the seamen petitioners, that they desire to appeal from that portion of this decree which denies said seamen "waiting time" under Section 4529 of the Revised Statutes of the United States, it is ORDERED that the Clerk of this Court retain in his possession the checks herein directed to be drawn, for the period of thirty (30) days to permit said seamen to perfect their appeal if they so desire.

.....
United States District Judge.

Norfolk, Virginia.

(70) **DISTRICT COURT'S CERTIFICATION OF NARRATIVE.**

I, D. Lawrence Groner, United States District Judge for the Eastern District of Virginia, do hereby certify that the above statement of the evidence, appears to be true, complete and properly prepared, and the same is hereby approved.

Given under my hand this 2 day of January, 1929.

D. LAWRENCE GRONER,
United States District Judge.

(71) **FINAL DECREE.**

Filed September 4th, 1928.

(Title omitted.)

This cause came on this day to be again heard on the pleadings and proof, the decree of sale entered herein on June 2nd, 1928, and the Marshal's report of sale filed on June 20th, 1928, and was argued by counsel.

On consideration whereof, it appearing to the Court from the report of Clarence G. Smithers, United States Marshal, filed herein, that pursuant to the decree entered herein on June 2nd, 1928, and in accordance with the terms thereof, the said United States Marshal has sold the Power Boat "Dola Lawson" to E. T. Lawson and H. L. Corkran for the sum of Sixteen Hundred and Fifty Dollars ($1,650.00) cash, which sum has been paid into the registry of the Court to the credit of this cause, the Court doth approve and confirm the said report.

And the Court having on June 12th, 1928, found from the evidence heard in open Court, that Ruffin Collie was entitled to recover of and from the Power Boat "Dola

Lawson" and/or Thomas D. Fergusson, her owner the full amount of his wages, as claimed in his libel and petition, to-wit, the sum of Three Hundred and Ninety-five Dollars ($395.00), together with interest on his said wages, as the same became due and payable and has a prior lien against the above proceeds of sale for said sum and interest, it does so ADJUDGE, ORDER AND DECREE.

And the Court having, on June 8th, 1928, found, from the evidence heard in open Court, that Clinton Cook was entitled to recover of and from the Power Boat "Dola Lawson" and/or Thomas D. Fergusson, her owner, the full amount of his wages, as claimed in his libel and petition, to-wit, the sum of Three Hundred and (72) Eighty Dollars ($380.00), together with interest on his said wages, as the same became due and payable, and has a prior lien against the above proceeds of sale for said sum and interest, it does so ADJUDGE, ORDER AND DECREE.

And the Court being of the opinion, from the evidence submitted, that Robbie Rowe is entitled to recover of and from the Power Boat "Dola Lawson" and/or Thomas D. Fergusson, her owner, the full amount of his wages, as claimed in his libel and petition, to-wit, the sum of One Hundred and Forty-Five Dollars ($145.00), together with interest on his said wages, as the same became due and payable, and has a prior lien against the above proceeds of sale for said sum and interest, it does so ADJUDGE, ORDER AND DECREE.

And the Court being of the further opinion that F. W. Darling and J. S. Darling, trading as J. S. Darling and Son, are entitled to recover of and from the said Power Boat "Dola Lawson" the sum of Twenty-Seven Dollars and Twenty-One Cents ($27.21), with interest thereon from March 30th, 1928, until paid, for certain supplies or other necessaries furnished to said Power Boat within a year prior to May 14th, 1928, the date that this suit was instituted, and are entitled to recover the balance of their claim amounting to Five Hundred and Fifteen Dollars and Eighty-Six Cents ($515.86) with

interest thereon from May 11th, 1927, in addition to such portion of their said prior claim as is not paid in full, from the said Thomas D. Fergusson, it does so ADJUDGE, ORDER AND DECREE.

And the Court being of the opinion that Nye, The Engine Man, Incorporated, is entitled to recover of and from the said Power Boat "Dola Lawson" the sum of Three Hundred and Twenty-One Dollars and Seventy-One Cents ($321.71) with interest thereon from May 9th, 1928, until paid, for certain supplies and other necessaries furnished to said Power Boat "Dola Lawson" (73) within a year prior to May 14th, 1928, the date that this suit was instituted and is entitled to recover the balance of its claim, amounting to Fifty-Eight Dollars and Fifty-Six Cents ($58.56), with interest thereon from April 14th, 1927, in addition to such portion of its said prior claim as is not paid in full, from the said Thomas B. Fergusson, it does so ADJUDGE, ORDER AND DECREE.

And the Court being of the further opinion that S. M. Sinclair is entitled to recover of and from the said Power Boat "Dola Lawson" the sum of Ninety-Nine Dollars and Thirty-One Cents ($99.31) with interest thereon from May 10th, 1928, until paid, for certain supplies and other necessaries furnished to the said Power Boat, within a year prior to May 14th, 1928, the date that this suit was instituted and is entitled to recover the balance of his claim, amounting to Two Hundred and Fifty-Six Dollars and Eighteen Cents with interest thereon from April 23rd, 1927, in addition to such portion of his prior claim as is not paid in full, from the said Thomas D. Fergusson, it does so ADJUDGE, ORDER AND DECREE.

And the Court being of the opinion that E. T. Lawson and I. E. Lawson, partners trading as E. T. Lawson and Son, are entitled to recover of and from the said Power Boat "Dola Lawson" the sum of Five Hundred and Ninety-Two Dollars and Twenty-Eight Cents ($592.28), with interest thereon from May 12th, 1928, until paid, for certain supplies or other necessaries furnished to said Power Boat within a year prior to May

14th, 1928, the date that this suit was instituted, and are entitled to recover the balance of their claim amounting to Ninety-Five Dollars and Eight Cents ($95.08), with interest thereon from April 26th, 1927, in addition to such portion of their said prior claim as is not paid in full, from the said Thomas D. Fergusson, it does so AD-JUDGE, ORDER AND DECREE.

(74) And the Court being of the further opinion that W. J. Williamson, trading as Williamsons', is entitled to recover of and from the said Power Boat "Dola Lawson" the sum of Thirty Dollars and Forty-One Cents ($30.41), with interest thereon from March 27th, 1928, until paid, for certain supplies of other necessaries furnished to said Power Boat within a year prior to May 14th, 1928, and is entitled to recover such portion of his said prior claim as is not paid in full, from the said Thomas D. Fergusson, it does so ADJUDGE, ORDER AND DECREE.

And the Court being of the opinion that L. Johnson and H. L. Corkran, partners trading as Johnson and Corkran, are entitled to recover of and from the said Power Boat "Dola Lawson", the sum of Four Hundred and Twenty-Three Dollars and Fifty Cents ($423.50) with interest thereon from July 16th, 1927, until paid, for certain supplies or other necessaries furnished to said Power Boat within a year prior to May 14th, 1928, the date that this suit was instituted, and are entitled to recover such portion of their said prior claim as is not paid in full, from the said Thomas D. Fergusson, it does so ADJUDGE, ORDER AND DECREE.

And the Court being of the further opinion that J. V. Bickford is entitled to recover of and from the said Power Boat "Dola Lawson", the sum of Forty-Two Dollars and Twenty-Five Cents ($42.25) with interest thereon from April 30th, 1928, until paid, for certain supplies or other necessaries furnished to said Power Boat within a year prior to May 14th, 1928, the date on which this suit was instituted, and is entitled to recover such portion of his said prior claim as is not paid in full, from the said Thomas D. Fergusson, it does so ADJUDGE, ORDER AND DECREE.

And it appearing that the claim of J. C. Council, in the sum of Ninety Dollars and Thirty-Five Cents (75) ($90.35), with interest from April 2nd, 1927, against the said Power Boat "Dola Lawson" and/or Thomas D. Fergusson, for certain supplies or other necessaries furnished to said Power Boat, did not accrue within one (1) year prior to May 14th, 1928, the date on which this suit was instituted, and that therefore said claim is not entitled to share in the aforesaid proceeds of sale now in the registry of the Court, but that said J. C. Council is entitled to recover the amount of said claim of and from only the said Thomas D. Fergusson, it does so ADJUDGE, ORDER AND DECREE.

And the Court being of opinion that the seamen petitioners herein are not entitled to any "waiting time", under Section 4529 of the Revised *States*, as amended, it does so ADJUDGE, ORDER AND DECREE.

And it further appearing that there is now on deposit in the Norfolk National Bank of Commerce & Trusts to the credit of this cause the sum of Sixteen Hundred and Fifty ($1,650.00) the proceeds of sale of said vessel, and that, except as to the claims for earned wages, together with accumulated interest thereon, which constitute prior liens against the same, the said fund is insufficient to pay all the allowed lien claims, with costs, in full, and that the same should be distributed as hereafter set out, to-wit, to the claimants of seamen's wages the full amount of their earned wages and interest, as aforesaid, and to the other lien claimants who extended credit to the said vessel within one year prior to May 14th, 1928, the date on which this suit was instituted, .28714 of their respective lien claims, as hereinabove set forth, the Court doth further ADJUDGE, ORDER AND DECREE that the Clerk of the Court do draw his checks, on the Norfolk National Bank of Commerce & Trusts, out of the fund now in the registry of the Court to the credit of this cause, in favor of the following parties in payment of the sums set opposite their respective names, said checks to be countersigned by the Judge of this Court and to be as follows, to-wit:

(76) To Joseph P. Brady, Clerk, Clerk's fees $54.60
To Clarence G. Smithers, United States Marshal, for Marshal's fees $38.78
To Virginian-Pilot Publishing Company for advertising bills, $19.08
To Phlegar & Tilghman for Stenographers' fees $15.00
To H. C. Ivy for Stenographer's fees $10.00
To J. S. Darling & Son, for guard hire $92.50
To Kelsey & Jett, taxed proctor's fee $10.00
To J. L. Morewitz, proctor's fee for attending depositions $5.00
To J. L. Morewitz, proctor for Ruffin Collie, $402.57
To J. L. Morewitz, proctor for Clinton Cook, $388.00
To J. L. Morewitz, proctor for Robbie Rowe $151.50
To Kelsey & Jett, proctors for J. S. Darling & Son $7.97
To Walter Sibert, proctor for Nye The. Engine Man, Incorporated, $93.54
To Kelsey & Jett, proctors for S. M. Sinclair, $28.87
To Hughes, Little & Seawell, proctors for E. T. Lawson & Son, $172.19
To Kelsey & Jett, proctors for W. J. Williamson, $ 8.90
To Henry Bowden & S. E. Forwood, proctors for Johnson & Corkran, $129.20
To J. V. Bickford, $12.30

$1,650.00

(77) And it appearing to the Court, from statements made in open Court by the proctors for the seamen petitioners, that they desire to appeal from that portion of this decree which denies said seamen "waiting time" under Section 4529 of the Revised Statutes of the United States, it is ordered that ~~the Clerk of this Court retain in his possession the checks for taxed proctors' fees and the checks herein directed to be drawn in favor of the lien claimants, other than said seamen,~~ *this decree be*

suspended until the expiration of the time allowed by law and the rules of this Court for the perfection of such an appeal, ~~but the other checks, directed to be drawn to cover the costs ordered to be paid and the wage claims allowed, shall be delivered to the respective parties forthwith, without prejudice to any of the rights of the said seamen petitioners, in the premises, and especially as to their right to prosecute their said appeal.~~

D. LAWRENCE GRONER,
United States District Judge.

Norfolk, Virginia.

(78) (Caption omitted.)

ORDER DIRECTING PAYMENT OF COSTS OUT OF FUND IN THE REGISTRY.

Filed September 24, 1928.

It appearing to the Court that there are certain fees due and payable to the Clerk and Marshal in this cause and that the deposit made at the time of the institution of the suit is inadequate to pay said fees,

And it further appearing to the Court that the proceeds of the sale of said Power Boat Dola Lawson are now on deposit in the registry of the Court from which said fees are payable,

On consideration whereof, it is ordered by the Court that the Clerk of this Court, or his Deputy, do draw his check on the funds to the credit of this Court in the Norfolk National Bank of Commerce and Trusts, Norfolk, Virginia, in favor of Joseph P. Brady, Clerk, for the sum of Fifty Dollars ($50.00), and said Clerk is directed to pay said fees from said sum and account for the residue, if any, in accordance with law; said check to be countersigned by the Judge of this Court.

D. LAWRENCE GRONER,
United States District Judge.

Norfolk, Virginia.

(79) **PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS.**

Filed Nov. 30, 1928.

IN THE U. S. DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

Ruffin Collie, Clinton Cook and Robbie Rowe, Intervening Libellants-Appellants,
v.
Power Boat "Dola Lawson" and/or Thomas D Fergusson, her owner, Respondents-Appellees,
and
F. W. Darling and J. S. Darling, trading as J. S. Darling and Son, Libellants-Appellees,
and
Nye, The Engine Man, Incorporated, et als., Intervening Libellants-Appellees
} In Admiralty.

To the Honorable Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

The petition of Ruffin Collie, Clinton Cook and Robbie Rowe, the intervening libellants-appellants herein, acting pusuant to the Act of Congress dated July 1, 1918, (being U. S. Code 28:837), permitting seamen to sue and appeal without requiring prepayment of or any security for costs, respectfully *shows* that they are aggrieved by a final decree entered in the above cause by the District Court of the United States for the Eastern District of Virginia, at Norfolk, on the Fourth day of September, 1928.

Petitioners assign the following errors:

1. The Court erred in concluding: "that the seamen petitioners herein are not entitled to any 'waiting time'," under Section 4529 of the Revised Statutes, as amended.

2. The Court erred in not allowing each of said sea-

men petitioners the "waiting time", provided by Cosgress, until their respective earned wages, and the ac-
(80) crued indemnities due them for the refusal and neglect to pay the same, are received by them.

3. The Court erred in denying said appellants any "waiting time" for the refusal and neglect to pay them, after finding that each of them were: "entitled to recover of and from the Power Boat 'Dola Lawson' and/or Thomas D. Fergusson, her owner, the full amount of his wages, as claimed in his libel and petition * * * together with interest on his said wages, as the same became due and payable, and has a prior lien against the above proceeds of sale for said sum and interest,' especially after so finding in open Court on June 8, 1928, and June 12, 1928, (three months prior to the entrance of the final decree herein), as to the wages clamed by appellants Cook and Collie, respectively.

4. The Court erred in not holding that appellants Ruffin Collie and Clinton Cook were each entitled to damages for the breach of their respective contracts of hire, including, in the case of appellant Ruffin Collie, return transportation and subsistence to Washington, North Carolina, the port of his shipment.

5. The Court erred in refusing to permit appellants to obtain the wages respectively decreed them, *without prejudice* to their right to appeal from the portion of the decree denying their respetive claims for "waiting time" and/or breach of contract, as set up in their intervening libels and petitions.

6. The Court erred in suspending, over their objec-
tion, the payment of the wages, interest and costs ad-
judged to be due the appellants in the final decree en-
(81) tered on September 4, 1928.

7. The Court erred in not directing the *immediate* payment from the fund in the Registry, of the amounts decreed appellants, along with their costs, as prayed for

in their respective petitions, continuously contended for on their behalf throughout these proceedings and again outlined in the drafts of final decree submitted by them on July 16, 1928, and August 17, 1928, respectively.

WHEREFORE for these and other errors apparent on the face of the record the petitioners hereby appeal from that portion of the said decree, allowing them merely their earned wages and interest, to the Circuit Court of Appeals for the Fourth Circuit, and pray that the same, together with a full transcript of the record, may be sent to the said Court without delay; that the said Court will proceed to hear said cause; that the aforesaid decree may be modified to the extent of allowing the respective petitioners the additional sums due each of them for "waiting time" and/or breach of contract, as demanded in their respective pleadings; and that said petitioners may have such other and further relief as in law and justice they may be entitled to receive.

RUFFIN COLLIE,
CLINTON COOK &
ROBBIE ROWE,

By J. L. MOREWITZ,
Their Proctor.

PERCY CARMEL,
Of Counsel.

(82) **APPELLANT'S PRAECIPE.**

Filed December 26, 1928.

To the Clerk of the District Court:

The intervening libellants-appellants hereby indicate the following portions of the record to be incorporated in the transcript for the appeal now being taken by them:

(1) The pleadings, (Itemized statements to be omitted).

(2) The evidence in narrative form, together with the exhibits therein referred to and the certificate of the Judge of the District Court as to the said evidence.

(3) All original exhibits offered in evidence, as well as the original of the final decree entered on September 4, 1928, and the draft of final decree submittd by supply and repair lien claimants, to be certified by the Clerk of the District Court to the Clerk of the Circuit Court of Appeals, the same to be subject to the inspection and consideration of the appellate court and of counsel for the parties, respectively but that in addition thereto the following exhibits, or the following portions thereof, for convenient reference, shall be made a part of the Transcript of Record, to-wit: "A"—Exhibits numbered 1 to 6, introduced by appellants; "B"—The draft of decree submitted by supply and repair lien claimants.

(4) The final decree entered on September 4, 1928.

(5) The Notice of Appeal.

(6) The Petition for Appeal and Assignment of Errors.

(83) (7) *Introlocutory* Decree, Directing Sale by Marshal, entered on June 2, 1928.

(8) Marshal's Report of Sale, filed June 20, 1928.

(9) Order Directing Payment of Certain Costs Out of Fund in Registry.

(10) All appeal papers.

(11) Stipulations of counsel.

J. L. MOREWITZ,
Proctor for Appellants.

(84) **DETERMINATION OF THE COURT AS TO CONTENTS OF TRANSCRIPT.**

Filed January 2, 1928.

Ruffin Collie, Clinton Cook and Robbie Rowe, Intervening Libellants-Appellants,
v.
Power Boat "Dola Lawson" and/or Thomas D. Fergusson, her owner, Respondents-Appellees,
and
F. W. Darling and J. S. Darling, trading as J. S. Darling and Son, Libellants-Appellees,
and
Nye, The Engine Man, Incorporated, et als., Intervening Libellants-Appellees.
} In Admiralty.

The appellants having filed their *praecipe* herein on the 26th day of December, 1928, it is now hereby ORDERED, ADJUDGED and DECREED that the record in this case upon appeal shall consist of the following and the Clerk of this Court is directd to forthwith proceed to transmit a certified copy of the said transcript to the Circuit Court of Appeals for the Fourth Circuit, to-wit:

(1) The pleadings, omitting itemized statements therefrom.

(2) The evidence in narrative form, together with the exhibits therein referred to and the certificate of the Judge of the District Court as to the said evidence.

(3) All original exhibits offered in evidence, as well as the original of the final decree and the draft of decree submitted by the supply and repair lien claimants, to be certified by the Clerk of the District Court to the Clerk of the Circuit Court of Appeals, the same to be subject to the inspection and consideration of the appellate Court and of counsel for the parties, respectively,

but that in addition thereto the following exhibits, or the following portions thereof, for convenient reference, shall be made a part of the Transcript of Record, to-wit:

"A"—Exhibits Numbered 1 to 6, introduced by appellants;

"B"—The draft of decree submitted by supply and repair lien claimants.

(85) (4) The final decree entered on September 4, 1928.

(5) The Notice of Appeal.

(6) The Petition for Appeal and Assignment of Errors.

(7) *Introlocutory* Decree, Directing Sale by Marshal, entered on June 2, 1928.

(8) Marshal's Report of Sale, filed June 20, 1928.

(9) Order Directing Payment of Certain Costs Out of Fund in Registry.

(10) All appeal papers.

(11) Stipulations of counsel.

D. LAWRENCE GRONER,
U. S. District Judge.

Norfolk, Virginia.

(86) **MEMORANDUM OF ORIGINAL PAPERS ACCOMPANYING TRANSCRIPT OF RECORD.**

1. Petition for appeal.

2. Order allowing appeal.

3. Notice of appeal. Service accepted.

4. Citation. Service accepted.

(87) **CERTIFICATE OF THE CLERK.**

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, Joseph P. Brady, Clerk of the District Court of the United States for the Eastern District of Virginia, do hereby certify that the foregoing is a full and true transcript of the record of the proceedings and judgment of the said Court, as directed by the Court, in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at Norfolk, in said District, this 5th day of January, A. D. 1929.

JOSEPH P. BRADY,
(Seal) Clerk, U. S. District Court.

By: PAUL R. FLANAGAN,
Deputy Clerk.

(88) **PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.**

No. 2831.

Ruffin Collie, Clinton Cook and Robbie Rowe,
Appellants,

versus

Thomas D. Fergusson; F. W. Darling and J. S. Darling, trading as J. S. Darling & Son; S. M. Sinclair; W. J. Williamson; J. C. Council; Nye, the Engine Man, Incorporated; E. T. Lawson and I. E. Lawson, trading as E. T. Lawson & Son; L. Johnson and H. L. Corkran, trading as Johnson & Corkran, and J. V. Bickford,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

January 8, 1929, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, notice of appeal, and citation are certified up under Sec. 7 of Rule 14.

Same day, the original exhibits (documents) are certified up.

Same day, the appearance of J. L. Morewitz is entered for the appellants.

ORDER ALLOWING APPELLANTS TO PROSECUTE APPEAL WITHOUT PREPAYMENT OF COSTS.

Filed January 11, 1929.

(Style of Court and Title Omitted.)

IT APPEARING TO THE COURT THAT THIS cause was prosecuted by the appellants in the District (89) Court in accordance with the Act of Congress dated July 1, 1918, (28 U. S. Code #837) which permits seamen to sue and appeal, without security or prepayment of costs, for the enforcement of the laws of the United States enacted for the protection, health and safety of seamen,

IT IS NOW HERE ORDERED that the Appellants be, and they are hereby, allowed to further prosecute their several causes of action in this Court, as such seamen, in accordance with the aforesaid Act of Congres, which was approved on July 1, 1918; that the Clerk of this Court be, and he is hereby directed to docket this cause, and that the same be heard on the original record, without requiring from the said Appellants any security for their costs or the prepayment of same, but the cost of preparing and certifying said record is to abide the final determination of the cause.

Richmond, Va., Jany. 11, 1929.

EDMUND WADDILL, JR.,
U. S. Circuit Judge.

January 28, 1929, stipulation to place case at the foot of the docket for argument at the January term, 1929, is filed.

April 4, 1929, the appearance of D. Arthur Kelsey and R. Arthur Jett is entered for the appellees J. S. Darling & Son, S. M. Sinclair, E. T. Lawson & Son, Williamson and Johnson & Corkran.

April 11, 1929, stipulation as to the time for the filing of appellees' brief is filed.

April 22, 1929, two typewritten copies of the transcript of record are filed.

ARGUMENT OF CAUSE.

April 22, 1929, (April term, 1929) cause came on to be heard before Waddill, Parker and Northcott, Circuit Judges, and is argued by counsel and submitted.

(90) **PER CURIAM OPINION.**

Filed May 2, 1929.

UNITED STATES CIRCUIT COURT OF APPEALS

Fourth Circuit.

No. 2831.

Ruffin Collie, Clinton Cook and Robbie Rowe,
Appellants,

versus

Thomas D. Fergusson; F. W. Darling and J. S. Darling, trading as J. S. Darling & Son; S. M. Sinclair; W. J. Williamson; J. C. Council; Nye, the Engine Man, Incorporated; E. T. Lawson and I. E. Lawson, trading as E. T. Lawson & Son; L. Johnson and H. L. Corkran, trading as Johnson & Corkran, and J. V. Bickford, Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.
In Admiralty.

(Argued April 22, 1929. Decided May 2, 1929.)

Before WADDILL, PARKER and NORTHCOTT, Circuit Judges.

JACOB L. MOREWITZ (PERCY CARMEL on brief) for Appellants, and D. ARTHUR KELSEY (KELSEY & JETT on brief) for J. S. DARLING & SON; S. M. SINCLAIR, E. T. LAWSON & SON, W. J. WILLIAMSON and JOHNSON & CORKRAN, Appellees.

PER CURIAM:

(91) We have duly considered the questions arising upon the petition for appeal from the decree of the District Court filed in this cause on September 4, 1928, and the conclusion reached by us is that the decree should be affirmed.

And it appearing that the amounts found to be due appellants were withheld from them pending this appeal at the instance of appellees, although appellees did not appeal from the order allowing same, we think it but right that appellants be allowed interest for the time during which the amounts due them have been thus withheld, and that the costs on appeal be divided.

Affirmed.

(92) **DECREE.**

Filed and Entered May 2, 1929.

UNITED STATES CIRCUIT COURT OF APPEALS

Fourth Circuit.

No. 2831.

Ruffin Collie, Clinton Cook and Robbie Rowe, Appellants,

vs.

Thomas D. Fergusson; F. W. Darling and J. S. Darling, trading as J. S. Darling & Son; S. M. Sinclair; W. J. Williamson; J. C. Council; Nye, the Engine Man, Incorporated; E. T. Lawson and I. E. Lawson, trading as E. T. Lawson & Son; L. Johnson and H. L. Corkran, trading as Johnson & Corkran, and J. V. Bickford, Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with interest to the Appellants herein from the date of the decree of the said

District Court until paid, and that the costs on this appeal be divided between the Appellants and the Appellees

May 2nd, 1929.

EDMUND WADDILL, JR.,
Senior Circuit Judge.

(93) **PETITION OF APPELLANTS FOR A REHEARING.**

Presented May 28, 1929.

(Style of Court and Title Omitted.)

MAY IT PLEASE THE COURT:

Ruffin Collie, Clinton Cook and Robbie Rowe, the appellants in this cause, humbly complaining of the decision rendered therein on May 2, 1929, petition this Honorable Court to grant them a rehearing, the grounds therefor being as follows:

I. *This Court's Per Curiam Opinion modifies the Decree of the District Court (unsupported by any opinion), without giving effect to either the applicable decisions of the Supreme Court of the United States, the previous opinions of this Court, the similar cases decided by three different District Courts in this Circuit, or the great weight of authority.*

Compare: *The Steel Trader*, 275 U. S. 388, adopting *Calvin* v. *Huntley*, 178 Mass. 29, 32; 59 N. E. 435; *Pacific Mail S. S. Co.* v. *Schmidt*, 241 U. S. 245, citing *Palace Shipping Co.* v. *Caine*, A. C. 386 (House of Lords, July 29, 1907); *Hicks* v. *Guiness*, 269 U. S. 71; *The Charles Whittemore* (C. C. A. 4), 11 F. (2d) 344; *The Walter D. Noyes* (C. C. A. 4), 20 F. (2d) 342, 21 F. (2d) 607; *The Ella Pierce Thurlow* (C. C. A. 4), 25 F. (2d) 835; *The Lake Galewood* (C. C. A. 4), 21 F. (2d) 987; 25 F. (2d) 1020; *The Trader*, 17 F. (2d) 623; *The Fort Gaines*, 18 F. (2d) 413; *The Chester*, 25 F. (2d) 908; *Gerber* v. *Spencer* (C. C. A. 9), 278 F. 886;

Vincent v. *U. S.* (C. C. A. 9), 272 F. 889; *Buckley* v. *Oceanic* (C. C. A. 9), 5 F. (2d) 545; *The Astoria* (C. C. A. 5), 281 F. 618, 621; *The El Estro*, 14 F. (2d) 349, (C. C. A. 5), 25 F. (2d) 349; *Cox* v. *Lykes*, 237 N. Y. 376, 143 N. E. 226; *Burns* v. *Davis* (C. C. A. 1), 271 F. 889; *Covert* v. *British Brig Wexford*, 3 Fed. 577, 578, 579; *The Great Canton*, 299 F. 953; *The Nika*, 287 F. 6717; *The Morning Star*, 1 F. (2d) 410; *Caffyn* v. *Peabody*, 149 Fed. 294.

II. *The fact that the vessel's owner and master, appellee Fergusson, (against whom personal judgments in favor of the other lienors are sustained) defaulted in the Trial Court, as well as in this Court, and still "refuses or neglects to make payment * * * without sufficient cause", after testifying that: "The claims asserted by Ruffin Collie and Clinton Cook in their intervening libel* (94) *are correct", has been overlooked or disregarded.*

Compare: Judicial and legislative history of U. S. C. Title 46, #596. See especially those of the above cited cases that construe this remedial statute. Also *Everett* v. *U. S.*, 277 F. 256, (C. C. A. 9), 284 F. 203, certiorari denied 261 U. S. 615.

III. *After deciding: "That the amounts found to be due appellants were withheld from them pending this appeal at the instance of appellees," this Court erred in not following the plain mandate of U. S. C. Title 46 #596, by awarding the Statutory wages provided therein, together with full costs, instead of merely: "Interest for the time during which the amounts due them have been thus withheld and that the costs on appeal be divided."*

Compare especially: *The Steel Trader, Palace Shipping Co.* v. *Caine, Hicks* v. *Guiness, The Charles Whittemore, The Ella Pierce Thurlow, The Lake Gaiewood, The Trader, The Fort Gaines, Gerber* v. *Spencer, Cox* v. *Lykes, Covert* v. *British Brig Wexford, The Great Canton, The Nika, The Morning Star, supra; Benedict's Admiralty* (5th Ed.) #561.

CONCLUSION.

The petitioners submit that this case involves questions of every day occurrence; that the case, in view of its practical importance to seamen and shipowners generally, as illustrated by the fact that two similar controversies are now on their way to this Court, does not deserve summary disposition; and that they are entitled to the redress they seek.

They, therefore, pray that a rehearing be granted them.

Respectfully submitted,

J. L. MOREWITZ,
Proctor for Petitioners.

PERCY CARMEL,
Of Counsel.

I hereby certify that the above petition for rehear-
(95) ing is presented in good faith and not for the purpose of delay.

J. L. MOREWITZ.

On another day, to-wit, June 3, 1929, the mandate of this Court in this cause is issued and transmitted to the United States District Court at Norfolk, Virginia, in due form.

Same day, the original petition for appeal, order allowing appeal, and notice of appeal are returned to the Clerk of the United States District Court at Norfolk, Virginia.

Same day, the original exhibits (documents) are returned to the Clerk of the District Court at Norfolk, Virginia.

ORDER DENYING REHEARING.

Filed and Entered July 1, 1929.

UNITED STATES CIRCUIT COURT OF APPEALS.

Fourth Circuit.

No. 2831.

Ruffin Collie, Clinton Cook and Robbie Rowe, Appellants,

vs.

Thomas D. Fergusson; F. W. Darling and J. S. Darling, trading as J. S. Darling & Son; S. M. Sinclair; W. J. Williamson; J. C. Council; Nye, the Engine Man, Incorporated; E. T. Lawson and I. E. Lawson, trading as E. T. Lawson & Son; L. Johnson and H. L. Corkran, trading as Johnson & Corkran, and J. V. Bickford, Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

---

(96) THIS COURT having at its April term, 1929, rendered its decision affirming the decree of the said District Court appealed from in this cause, and the appellants having on May 28, 1929, presented to the Court a petition for a rehearing of the said cause, and the same having been carefully considered,

IT IS NOW HERE ORDERED BY THIS COURT that the rehearing asked for, be, and the same is hereby, denied at the cost of the appellants.

JOHN J. PARKER,
U. S. Circuit Judge.

July 1st, 1929.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, CLAUDE M. DEAN, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause, as the same remains among the records and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 26th day of August, A. D. 1929.

(Seal.)

CLAUDE M. DEAN, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit.

By R. M. F. WILLIAMS, JR.,
Deputy Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 28, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CHARLES ELMORE
CL

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 423

RUFFIN COLLIE, CLINTON COOK AND ROBBIE ROWE, PETITIONERS,

versus

THOMAS D. FERGUSSON; F. W. DARLING AND J. S. DARLING, TRADING AS J. S. DARLING & SON; S. M. SINCLAIR; W. J. WILLIAMSON; J. C. COUNCIL; NYE, THE ENGINE MAN, INCORPORATED; E. T. LAWSON AND I. E. LAWSON, TRADING AS E. T. LAWSON & SON; L. JOHNSON AND H. L. CORKRAN, TRADING AS JOHNSON & CORKRAN, AND J. V. BICKFORD, RESPONDENTS.

MOTION FOR ADVANCEMENT.

Now come the seamen petitioners, and move the court to advance the above entitled cause for hearing on an early day convenient to the court.

This case was brought to this court without prepayment of costs, pursuant to the terms of U. S. C., title 28, section 837 (Seamen's Act of July 1, 1918). Certiorari was granted on October 28, 1929, on which date leave was also granted to file this Motion to Advance.

In the main there is here presented for determination the proper construction of U. S. C., title 46, section 596, in the light of the judicial history of said section and the cognate provisions of the Seamen's Acts of June 7, 1872, and March 4, 1915.

Because of their impecunious condition petitioners

beg leave to refer to their petition and brief heretofore filed on September 26, 1929, for the concise statement of the matter involved herein required by paragraph 4 of Rule 20 of this Honorable Court.

REASONS FOR ADVANCING THE CASE.

The reasons for advancing the case are, that as your petitioners are informed and believe:

1. The case involves a question of gravity and importance.

2. The petitioners are wage earners and this is an action to recover seamen's earned and statutory wages and petitioners' rights are in doubt pending the decision of this Honorable Court upon the issues raised on this appeal, and the rights of many thousands of other seamen and wage earners are in doubt and will be until the questions here raised are determined by this Honorable Court.

3. Questions practically identical to those involved in the present controversy are now pending before the Circuit Court of Appeals for the Fourth Circuit in two similar cases, and are also pending before other Federal and State Courts.

4. The questions involved in this case have been frequently before the Federal and State courts in a number of cases since the passage of the Act in question, and the various courts have construed the Act differently in many respects.

5. Your petitioners understand that Motions to Advance in cases involving cognate sections of the Seamen's Acts of June 7, 1872, and March 4, 1915, have heretofore been granted with practical uniformity.

6. Counsel representing the respondents, as shown on their admissions of service hereof filed with the Clerk, do not desire to be heard in opposition to this Motion to Advance. The application for certiorari was unopposed and petitioners understand that in all probability none of the respondents will put in any appearance before this Honorable Court when the case is argued on the merits.

It is respectfully submitted that it is appropriate that there should be an early hearing of this case by this court in order that the determination of the questions involved in this case may govern the same questions involved in the many other cases pending, that conflicting decisions may be avoided, and that unnecessary expense to parties litigant may be prevented.

JACOB L. MOREWITZ,
Proctor for Petitioners.

PERCY CARMEL,
Of Counsel.

FILE COPY

No. 423

FILED
SEP 26 1929
CHARLES ELMORE CROP
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Supreme Court of the United States

OCTOBER TERM, 1929.

RUFFIN COLLIE, CLINTON COOK AND ROBBIE ROWE, PETITIONERS,

versus

THOMAS D. FERGUSSON; F. W. DARLING AND J. S. DARLING, TRADING AS J. S. DARLING & SON; S. M. SINCLAIR; W. J. WILLIAMSON; J. C. COUNCIL; NYE, THE ENGINE MAN, INCORPORATED; E. T. LAWSON AND I. E. LAWSON, TRADING AS E. T. LAWSON & SON; L. JOHNSON AND H. L. CORKRAN, TRADING AS JOHNSON & CORKRAN, AND J. V. BICKFORD, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JACOB L. MOREWITZ,
Proctor for Petitioners.

PERCY CARMEL,
Of Counsel.

RICHMOND PRESS, INC., PRINTERS

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Supreme Court of the United States

OCTOBER TERM, 1929.

RUFFIN COLLIE, CLINTON COOK AND ROBBIE ROWE, PETITIONERS,

versus

THOMAS D. FERGUSSON; F. W. DARLING AND J. S. DARLING, TRADING AS J. S. DARLING & SON; S. M. SINCLAIR; W. J. WILLIAMSON; J. C. COUNCIL; NYE, THE ENGINE MAN, INCORPORATED; E. T. LAWSON AND I. E. LAWSON, TRADING AS E. T. LAWSON & SON; L. JOHNSON AND H. L. CORKRAN, TRADING AS JOHNSON & CORKRAN, AND J. V. BICKFORD, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

The petition of Ruffin Collie, Clinton Cook and Robbie Rowe respectfully shows to this Honorable Court:

A. SUMMARY STATEMENT OF THE MATTERS INVOLVED.

(1) The denial of the right of unpaid seamen to priority in the proceeds of the sale of their vessel, and/or a judgment *in personam* against her defaulting master and owner, for the statutory double wages provided by U. S. Code title 46, Section 596, incurred by reason of

the refusal and neglect to pay said seamen the wages claimed in their libels and found to be due. (Assignments of Error Nos. 1, 2, 3, R., 65-66.)

(2) The denial of the right of Petitioners Collie and Cook:

> "to damages for the breach of their respective contracts of hire, including, in the case of Ruffin Collie, return transportation and subsistence to Washington, North Carolina, the port of his shipment!" (Assignment of Error No. 4, R., 66.)

(3) The propriety of the action of the District Court in suspending the operation of the Decree of Distribution, entered on September 4, 1928, after appellants asked for an order directing the payment forthwith, (R., 64), of the wages adjudged to be due them and the costs:

> "without prejudice to any of the rights of the said seamen petitioners, in the premises, and especially as to their right to prosecute their said appeal!" (Assignments Nos. 5, 6, 7, R., 66-67.)

(4) Whether or not it was proper for the Court of Appeals, after finding that without sufficient cause:

> " * * * the amounts ($402.57, $388.00 and $151.50, respectively) *found* to be due appellants were withheld from them pending this appeal at the instance of appellees,"

to hold on May 2, 1929 (R., 74-76) that petitioners were merely entitled to:

> " * * * interest for the time during which the amounts due them have been thus withheld, and that the costs on appeal be divided, [the costs thus assessed against them being $94.21, more than two and one-half times the interest then accrued],

instead of awarding the double wages provided by U. S. Code title 46, Section 596, together with their *full* appellate costs of $189.07.

B. REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Because the Circuit Court of Appeals for the Fourth Circuit has:

(1) Rendered a judgment that is in real and embarrassing conflict with its own previous decisions, the opinions of this Court, the judgment of the British House of Lords, and the decisions of the Circuit Courts of Appeals for the First, Fifth and Ninth Circuits, as well as the courts of last resort in New York and Massachusetts, so that a review by this Court is necessary for uniformity of decision in the federal and state courts in respect to a highly remedial federal statute, intended, as stated by Mr. Justice Sutherland in *O'Hara* v. *Luckenbach*, 269 U. S. 364, 367: "to safeguard the seamen's welfare as workmen."

(2) Decided an important question of general law in a way that is untenable and in conflict with the weight of authority.

(3) Decided an important question of federal law of very extensive and every-day occurrence, which has not been, but should be, settled by this Court.

(4) Decided a federal question in a way that conflicts with the applicable decisions of this Court, the judicial history of U. S. C. title 46, Sections 594, 596, and the cognate sections of the Seamen's Acts of June 7, 1872-March 4, 1915.

(5) So far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the District Court for the Eastern District of Virginia, as to call for an exercise of this Court's power of supervision.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Fourth Circuit should be granted.

JACOB L. MOREWITZ,
Proctor for Petitioners.

PERCY CARMEL,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1929.

RUFFIN COLLIE, CLINTON COOK AND ROBBIE ROWE, PETITIONERS,

versus

THOMAS D. FERGUSSON; F. W. DARLING AND J. S. DARLING, TRADING AS J. S. DARLING & SON; S. M. SINCLAIR; W. J. WILLIAMSON; J. C. COUNCIL; NYE, THE ENGINE MAN, INCORPORATED; E. T. LAWSON AND I. E. LAWSON, TRADING AS E. T. LAWSON & SON; L. JOHNSON AND H. L. CORKRAN, TRADING AS JOHNSON & CORKRAN, AND J. V. BICKFORD, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION.

I. THE DECISIONS OF THE COURTS BELOW.

The *per curiam* decision of the Circuit Court of Appeals for the Fourth Circuit, was rendered on May 2, 1929, and is reported in 31 F. (2d) 1010. On said date the Court's decree was also entered and petitioners in

due time thereafter applied for a rehearing (R., 76), which was denied on July 1, 1929, without opinion (R., 79).

The appellate court's *per curiam* decision and its decrees thereon are to be found on pages 75, *et seq.*, of the transcript of record, and the decree of the District Court, entered on September 4, 1928, appears at page 58, *et seq.* No opinion was filed by the trial court, which like the Court of Appeals, expressly refrained from giving any reason or citing any authority for its conclusions.

II. JURISDICTION.

(1) The date of the decree to be reviewed is July 1, 1929, and will be found upon page 79 of the record.

Grounds of This Court's Jurisdiction.

(2) This case involves important questions, (R., 65-67, 76-78), of maritime law, affecting seamen and shipping interests generally, which frequently arise before both federal and state tribunals, but have not heretofore been definitely decided by this Court, and which, for the information of the bench and bar of this country, should be determined, pursuant to U. S. C. title 28, Section 347 (a).

(3) Construction of the U. S. C. title 46, Section 596, (R. S. 4529), in the light of the judicial history of said section and the cognate provisions of the Seamen's Acts of June 7, 1872, and March 4, 1915.

III. STATEMENT OF THE CASE.

A. The Facts.

The "DOLA LAWSON" is a licensed vessel, duly entered in the United States Custom House as engaged in the Coastwise Trade. She was equipped for fish-trawling on the Atlantic Ocean and traded between Hampton, Virginia, and other Virginia, Maryland and North Carolina ports, (R., 36, 38), delivering her catches of fish and taking on ice, food, fuel and other supplies.

Rowe was hired in Hampton, Virginia, and worked on the vessel for six (6) weeks, beginning with September 1, 1927, at wages of $25.00 per week, (R., 17, 36-44). On January 1, 1928, sometime after Rowe left the vessel, Cook was employed, at $80.00 per month (R., 3-6, 22-28, 34-35), in Hampton, Virginia, and thereafter Collie was engaged at Washington, North Carolina, on January 15, 1928, at $100.00 per month, while the "DOLA LAWSON" was lying at that port. Both Collie and Cook remained on the vessel from the time they were hired up to May 14, 1928, when she was attached by the Marshal of the Eastern District of Virginia on a libel filed on that day by J. S. Darling and Son, but, with the exception of $5.00 paid Rowe and $25.00 paid to Collie, by the owner, Thomas D. Fergusson, nothing was paid these seamen on account of their claims. See Respondent Fergusson's admissions with regard to this (R., 37-38).

B. The Proceedings in the Trial Court.

Darling & Son, who were later awarded but $7.97 out of the proceeds of sale (R., 63), filed their libel against the "DOLA LAWSON" and Thomas D. Fergusson, her owner, on May 14, 1928. On May 16, 1928, immediately after the vessel was seized and they were forced to leave her, Petitioners Collie and Cook filed their intervening

petition, setting up (R., 3-6) the seizure by the Marshal; the fact that lien claims were piling up; that said seamen had claims for wages and breach of contract, in addition to "waiting time" that (R., 5) was:

> "increasing at the aggregate rate of Twelve Dollars ($12.00) per day and that if their claims are not paid until a distribution is had in the ordinary course, in view of the broken down condition of the said power boat and the present low value of vessels of this character, there will not be a sufficient sum realized from its sale to cover the amounts which will be lawfully due unto your said petitioners."

Accordingly, (R., 6) petitioners prayed among other things:

> "That the said vessel be forthwith condemned and sold to pay the amount of petitioners' claims."

Contemporaneously with the filing of their petition, a letter (Libellants' Exhibit No. 1; R., 46), was addressed to the District Judge, through his Clerk, as well as to all counsel who had appeared in the case up to that time, apprising them of the nature of petitioners' claims and stressing the fact that it was desired to have the boat sold forthwith:

> "and the proceeds distributed without any undue delay, in line with the prayer of the petition",

then being filed on behalf of Collie and Cook.

No answer or pleading of any kind was ever filed by any of the parties to said petition of Collie and Cook. Not until June 2, 1928, did the libellants submit the order of sale that was entered on that day (R., 20). This order recited the proceedings up to that time and set forth:

"that no appearance has been entered and no answer or other defense interposed, and that it will be to the best inferest of all parties concerned that the said Power Boat "DOLA LAWSON", now in the custody of the Marshal of this Court, be sold in order to obviate further expense."

On June 9, 1928, Cook and several of the repair and supply lien claimants appeared in open court and proved their claims, the Court deciding from the bench that Cook was entitled to recover from the "DOLA LAWSON" and/or Respondent Fergusson, her owner, the full amount of his wages (R., 34-35; 58-59), but no damages or "waiting time" were allowed him. Collie's claim was also submitted as having been proven by Cook (R., 23-24; 34-35), but, the Court feeling that Collie himself should be produced, the matter was laid over until June 12, 1928, when this seaman testified, as did Respondent Fergusson, who has never interposed any defense and who up to that time had not appeared in court. The Court again ruled from the bench and held that Collie was likewise entitled to the full amount of his wages, but, in line with its action with regard to Cook's claims of similar character, also refused to award this seaman any damages for breach of contract or "waiting time" (R., 62), either against the vessel *in rem* or her owner *in personam*.

In the meantime guard hire amounting to $92.50 had accumulated in favor of Darling and Son, the vessel, which brought but $1,650.00, not being put up and sold at auction until June 18, 1929 (R., 21, 63). Petitioner Rowe then became aware that this suit was pending, and on June 23, 1928, his petition was filed and all counsel were again and repeatedly thereafter advised (Libellants' Exhibits Nos. 2, 3, 4, 5, 6; R., 47-51), of petitioners' desire that:

"a decree distributing the fund might be entered at the earliest possible moment".

From July 16, 1928, to August 2, 1928, efforts were made by petitioners' proctor to get the proctors who were taking the lead in opposing the wage claims to agree on a date to take the depositions of Rowe and his witness. Finally, on the latter date, notices of the taking of these depositions were served on all opposing counsel by mail and their co-operation in getting the money in the Registry distributed was again requested. (Libellants' Exhibit No. 5, R., 50.) The depositions were completed on August 17, 1928, and on that day submitted to the District Judge, along with the draft of the decree that had been previously prepared, but which the repair and supply lien claimant objected to (R., 51).

On September 4, 1928, the form of decree theretofore submitted on behalf of appellants was signed by the District Judge, but only after he had interlineated the language on the last page thereof. These interlineations are physically indicated on the original of the final decree, which the trial court ordered transmitted to the Court of Appeals (R., 69), and are also shown in the transcript as printed. (R., 63-64.) The trial judge's action in suspending the operation of the decree:

> "until the expiration of the time allowed by law and rules of this Court for the perfection of such an appeal,"

was vigorously opposed by petitioners and as vigorously advocated by opposing counsel. Petitioners' draft called for the payment *forthwith* of the earned wages decreed them, as well as the costs, without prejudice to their right to prosecute their appeal. The District Court below struck out these provisions, and, in lieu thereof, inserted the above quoted suspending proviso, adopting the view expressed in the concluding paragraph of the draft presented on behalf of respondents (R., 57, 64).

C. The Proceedings on the Appeal.

Petitioner's application for appeal and assignment of errors was filed on November 30, 1928, (R., 65).

Due to the failure of the respondent owner to enter an appearance and the lack of interest manifested by the supply and repair lien claimants after it became apparent that they could not defeat the wage claims proved by the petitioning seamen, it became necessary to have the trial judge enter an order directing what the record should contain. This could not be accomplished until January 2, 1929, but the transcript was certified on January 5, 1929 (R., 71).

The case was promptly docketed on January 8, 1929, (R., 72), without prepayment of costs, by virtue of the provisions of U. S. C. title 28, Section 837, (Seamen's Act of July 1, 1918), under which petitioners now bring their application to this Court. The Court of Appeals was immediately asked by petitioners (R., 73) to place the cause at the foot of its January, 1929, Docket, but, due to the pressure of other business, was unable to do so. However, none of the respondents entered any appearance therein until April 4, 1929, those who finally appeared submitting a brief on April 22, 1929, and even now the respondent owner and three of the supply lien claimants are still in default (R., 73). A hearing was thereafter had in the appellate court on April 22, 1929, resulting in the *per curiam* decision of May 2, 1929, and the subsequent decree of July 1, 1929, denying the seamen's petition for a rehearing (R., 79).

IV. SPECIFICATION OF ERRORS.

The errors assigned and intended to be urged have been outlined above in the petition (pp. 1-4), to which reference is respectfully made.

V. ARGUMENT.

Point 1.—Petitioners' Wages Were Withheld "Without Sufficient Cause".

Respondent Fergusson testified that:

> "The claims asserted by Ruffin Collie and Clinton Cook in their intervening libel (R., 37), are correct,"

and both courts below found the essential facts in favor of all three petitioning seamen. The trial court, on *June 8, 1928*, established that Petitioner Cook (R., 34-35, 59) was:

> "entitled to recover of and from the Power Boat 'DOLA LAWSON' and/or Thomas D. Fergusson, her owner, the full amount of his wages, as claimed in his libel and petition * * * , together with interest on his said wages, as the same became due and payable and has a prior lien against the above proceeds of sale for said sum and interest,"

and likewise found in favor of Collie and Rowe (R., 58, 59), on *June 12, 1928*, and *September 4, 1928*, respectively.

The Circuit Court of Appeals for the Fourth Circuit, in overruling the District Court's suspension of the operation of its Decree of Distribution (R., 74), declared that, as:

> "the amounts found to be due appellants [petitioning seamen] were withheld from them pending this appeal at the instance of appellees, although appellees did not appeal from the order allowing same, we think it but right that appellants be allowed interest for the time during which the amounts due them have been thus withheld, and that the costs on appeal be divided."

On the basis of these conclusions it is perfectly clear that the wages of these seamen were withheld "without

sufficient cause" as defined in U. S. C. title 46, Section 596. This being true there became vested in them the right to collect from their vessel and/or her owner the statutory double wages provided in unmistakable terms, under the above remedial Act:

> "for *each* and *every* day during which payment is delayed * * * which sum *shall* be recoverable *as wages* in *any* claim made before the court;"

Surely, Respondent Fergusson, the owner, cannot escape the clear words of the statute, and, as shown by the great weight of authority the vessel is also liable *in rem* for "waiting time" thereunder.

POINT 2.—THE COURTS BELOW DISREGARDED THE JUDICIAL HISTORY OF U. S. C. TITLE 46, SECS. 594-596.

The decision of the Court of Appeals overlooks and disregards entirely the historical background of U. S. C. title 46, Sections 594, 596, and the reasons which brought about their enactment. This is illustrated by the resolute purpose twice manifested by Congress in successively increasing the measure of recovery, which was originally limited to ten days single pay by the Judiciary Act of July 20, 1790, 1 Stat. 133, for, except to increase the amount of extra wages recoverable, no substantial change has ever been made in the context of the parent Act. The Seamen's Act of March 4, 1915, Section 3, which doubled the unlimited "waiting time" previously provided by the Dingley Act of December 21, 1898, 30 Stat. 756, is, therefore, the final expression of the clear will of Congress, being enacted within a year after the decision of the Circuit Court of Appeals for the Ninth Circuit in *Pacific Mail S. S. Co.* v. *Schmidt,* (1914) 214 Fed. 513.

When that case got to this Court, in an opinion reported in 241 U. S. 245, the District Court's decision awarding extra pay up to the date of its decree was affirmed, though the statutory wages added thereto by the

Court of Appeals was disallowed, because it was held that the petitioning shipowner had ample justification for the appeal. As here the Court below specifically found (R., 74), that the earned wages confessedly due these seamen:

> "were withheld from them pending this appeal at the instance of appellees, although appellees did not appeal from the order allowing same,"

there can be no doubt that the situation now presented to this Court is much more flagrant than was passed on adversely to the shipowner in *Pacific Mail S. S. Co.* v. *Schmidt.*

Robertson v. *Baldwin,* 165 U. S. 275, 287, 299.
Tucker v. *Alexandroff,* 183 U. S. 424, 444.
The Eudora, 190 U. S. 169, 175.
Wilder v. *Inter-Island Co.,* 211 U. S. 239, 246, 248.
Inter-Island Co. v. *Byrne,* 239 U. S. 459, 462.
Sandberg v. *McDonald,* 248 U. S. 185, 202.
Strathearn v. *Dillon,* 252 U. S. 348.
Pacific Mail S. S. Co. v. *Lucas,* 258 U. S. 266.
O'Hara v. *Luckenbach,* 269 U. S. 364, 367.

POINT 3.—U. S. C. TITLE 46, SECS. 594-596 PROVIDE FOR MARITIME LIENS, AS WELL AS IN PERSONAM RECOVERIES.

In construing U. S. C. title 46, Section 594, a cognate section of the Act of June 7, 1872, which does not differ in essentials from U. S. C. title 46, Section 596, this Court in *The Steel Trader,* 275 U. S. 388 (1928), made it plain that seamen are entitled to a lien for the extra wages incorporated in their contracts by U. S. C. title 46, Sections 594, 596. Speaking through Mr. Justice McReynolds, this Court said:

> "The provision that such sum may be recovered 'as if it were *wages duly earned*' permits the seamen to enforce payment by the *special* and *sum-*

mary methods provided for collecting his ordinary wages.

"In *Calvin* v. *Huntley*, (1901) 178 Mass. 29, 32, 59 N. E. 435 [in which Mr. Justice Holmes, then Chief Justice of that Court, concurred] we think the Supreme Court of Massachusetts properly interpreted Section 4527 [U. S. C. title 46, Section 594], and in respect to it rightly said:

"'It speaks not of punishment, but of compensation; its object is to protect the seaman from loss rather than to punish the master for discharging him.

"' * * * in all fairness he should recover more than the amount due him for wages earned. Hence it might be deemed advisable to have this indefinite element made definite by a general law with reference to which the parties may conclusively be presumed to have contracted, and which therefore should be taken to be the law of the contract. The object of the statute is not to punish but to provide a reasonable rule of compensation for a breach of contract. We think the statute not penal but remedial. * * * [Italics and language in brackets added.]

In *Cox* v. *Lykes* (1924), 237 N. Y. 376, 143 N. E. 226, it was also held that the extra wages were recoverable as contractual compensation, following and approving the rule in *Calvin* v. *Huntley*, *supra*. The Court pointed to the fact that, long before the decision in *Pacific Mail S. S. Co.* v. *Schmidt*, *supra*, Mr. Justice Holmes, who wrote this Court's opinion therein, also concurred in the above unanimous decision of the Supreme Judicial Court of Massachusetts, while Chief Justice of that Court.

Chief Judge Cardozo, in delivering the unanimous opinion of the New York Court of Appeals, interpreting U. S. title 46, Section 596, and incidentally construing Section 597, said, at pages 379-380:

"Congress has expressly said that the extra compensation, when due, 'shall be recoverable as wages'. * * *

"How much this extra amount should be would be often a troublesome question if it were left open in every case. * * *

"The case cited from Massachusetts is authority for the ruling that an action for extra wages under Section 4527, Rev. Stat., (U. S. C. title 46, Section 594), which does not differ in essentials from Section 4529 (U. S. C. title 46, Section 596), may be maintained in the state courts, and is not an action for a penalty. * * *

"Here Congress, imposing a liability for the benefit of seamen, has put it on the same plane as a liability for wages, and has said that the two shall be enforceable together. * * *

"The amendment (to U. S. C. title 46, Section 597) means that if unfair advantage is taken of their necessities or ignorance, they are no longer to be concluded by releases which throw their rights away. The courts under the present act may relieve from oppression, though it fall short of fraud or duress in the rigor of its constraint, if thereby justice will be done.

"We think the inference permissible that for oppression or unfair advantage the annulment of this release would be in furtherance of justice. The trier of the facts so held, and, unless there is no basis in the record for the exercise of discretion, we are not at liberty in this court to say that he was wrong. The plaintiff was told that no money would be paid without the signing of the paper. He had been kept waiting many weeks; all his money was spent; he was at the end of his resources. He signed what was put before him because he was unable to wait longer. A different question would be here if his right to wages were shown to have been the subject of reasonable controversy. So far as the record shows, payment was withheld without color of excuse. Upon such a showing, wages earned during delay were as plainly due as wages earned during the voyage. Release of the whole, when the right is

uncontested, is not a fair condition of payment of a part."

Situations parallel to the case at bar were before Judge Cochran in *The Trader*, 17 F. (2d) 623, Judge Soper in *The Fort Gaines*, 18 F. (2d) 413, and Judge Coleman in *The Chester*, 25 F. (2d) 908, all of whom expressly determined that the *extra pay*, provided by U. S. C. title 46, Sections 594 and 596, respectively, is contractual and gives rise to a *prior* maritime lien. The above decisions are based upon *Gerber* v. *Spencer* (C. C. A. 9), 278 F. 886, 889-90, the outstanding appellate opinion on the subject, which is also cited with approval by the New York Court of Appeals in *Cox* v. *Lykes, supra*, the Ninth Circuit Court of Appeals in *Buckley* v. *Oceanic S. S. Co.*, 5 F. (2d) 545, and by the Fourth Circuit Court of Appeals below in *The Whittemore*, 11 F. (2d) 344, and *The Noyes*, 20 F. (2d) 342.

The principles controlling, where the payment of seamen's wages is delayed, were also adverted to by Judge Coleman in *The Lake Galewood*, 21 F. (2d) 987, affirmed by the Court of Appeals in 25 F. (2d) 1020, on the authority of *The Whittemore*, *The Noyes* and *The Thurlow* (C. C. A. 4), 25 F. (2d) 835, all of which decreed the payment of the statutory double wages as maritime liens.

The Br. Brig Wexford (D. C. N. Y.), 3 F. 577.
The Astoria (C. C. A. 5), 281 F. 618, 621.
The Nika, (D. C. Wash.), 287 F. 717.
The Great Canton, (D. C. N. Y.) 299 F. 953.
The Morning Star, (D. C. Wash.) 1 F. (2d) 410.

City of Montgomery, (D. C. N. Y.) 210 F. 673.
Burns v. *Davis*, (C. C. A. 1) 271 F. 439.
Vincent v. *U. S.*, (C. C. A. 9), 272 F. 889.
The El Estro, 14 F. (26) 349—aff: *sub-nom Southern Pac. Co.* v. *Hair*, (C. C. A. 5), 25 F. (2d) 349.

Everett v. *U. S.* (C. C. A. 9), 284 F. 203, 207, *certiorari* denied, 261 U. S. 615.

POINT 4.—THE EXTRA PAY PROVIDED BY U. S. C. TITLE 46, SEC. 596, IS AN INCIDENT TO THE EARNED WAGES.

Circuit Judge Hunt, speaking for the Ninth Circuit of Appeals, in *Gerber* v. *Spencer, supra,* which closely resembles the instant controversy, affirmed a judgment awarding $13,180.88 "waiting time", in addition to allowances for transportation and subsistence, holding that:

> "The purpose of the statute (U. S. C. title 46, Section 596), where there is not sufficient cause for refusal or neglect to pay as required, is to *secure* to the seamen an amount as extra pay by way of *compensation* for delay. The extra pay is an *incident* to the claim of wages proper. We adopt the clear statement by Judge Choate in *Covert* v. *British Brig Wexford,* (D. C.) 3 Fed. 577, 578, 579:"
>
> 'These *protective* statutes would be of little or no value to the seamen, if they do not give them a *lien* on the vessel. A mere right to enforce a personal claim for such small sums against the master or owner would generally be of no value to them; and, if they have a *lien,* it must, I think, be presumed that it was intended to be a *lien* in *all* respects like that for their stipulated wages—one equally beneficial to them.' *The Amazon* (D. C.), 144 Fed. 153.
>
> " * * * The *tender* made by Gerber was not sufficient to cover wages up to and including March 17, 1921, and *in addition* thereto a sum equal to two days' pay for each man every day from March 17 up to and including the date of tender, while for the *delay* in payment *after* April 27 there were no sufficient cause. * * *
>
> "The circumstance that the Pacific Motorship Company was in financial difficulties did not relieve it from an obligation with respect to claim for wages, including extra pay. The *Chas. L. Baylis,* (D. C.) 25 Fed. 862. * * * Cases pertinent to this are

Cubadist (D. C.), 252 Fed. 662; *City of Montgomery*, (D. C.), 210 Fed. 675."

"The general rule that right of other creditors are subordinate to claim for wages is applicable. The rights of seamen have always been *cautiously* guarded by statutes and the courts should make their decrees *in accord* with the spirit and intent of the law to *protect* the seamen."

"* * * When the seamen demanded their wages, the company did not dispute the amounts claimed by the men. It *failed* to take steps to meet demands; so did the receiver after he was appointed, for he denied that the libellants were entitled to wages from the day of shipping to the date of filing the libel. (Italics added.)

In concluding his opinion in *The Wexford, supra,* a decision that is also cited in *Cox* v. *Lykes,* and some of the other prevailing authorities interpreting U. S. C. title 46, Sections 594-596, Judge Choate used the following language, which is peculiarly applicable to the instant case:

"The wages must be deemed by the contract to be *agreed* upon as *this much more* in case of delay in payment. There must therefore be a decree for the seamen for their wages and *extra pay,* with costs, payable *at once,* in *preference* to all other claims." (Italics added.)

In *The Trader* (D. C., So. Car. 1926), *supra,* Judge Cochran directed the payment of wages due the seamen *immediately* after the vessel was sold. Subsequently they were decreed, out of the fund in the registry, passage money back to the port of shipment, as well as their living expenses while out of employment. Construing U. S. C. title 46, Sec. 596, the Court said:

"* * * It is to be observed that the statute expressly says that these so-called penalties shall be *'recoverable as wages'*. They are an incident to and a *part* of the *actual* wages, *just as much as interest*

is an incident to and a part of a debt. They are intended as *compensation* for the delay in the payment, and, inasmuch as they are an *incident* to and a *part* of the wages, they will constitute a maritime *lien* on the vessel, the *same* as wages." (Italics added.)

Compare:

Hicks v. *Guinness,* 269 U. S. 71.
Die Deutsche Bank v. *Humphrey,* 272 U. S. 517-23-25.

In *Hicks* v. *Guinness, supra,* this Court, in passing on a closely analogous matter involving the time during which interest (double wages are *substituted* for interest in the case at bar by U. S. C. title 46, Sec. 596) should run on as a *fixed* liability, unanimously held:

"The obligation of a contract is subject to implied exceptions, *but when a liability is incurred by wrong or default it is absolute. Interest* is due as one of its *incidentals,* and inability to pay it *no more excuses* from that than it does from the principal amount. Of course while the *damages remain unpaid interest during one time is as necessary as interest during another to effect the indemnification to which the delinquent is held by the law.*" * * * (Italics added.)

In *The Fort Gaines,* (D. C. Md. 1927), *supra,* Judge Soper said:

"The failure of the owners of a vessel to pay claims against her when seized upon legal process followed by sale of the vessel, and the termination of the employment of the crew consequent upon such proceedings, have been held to constitute a *termination* of the shipping agreement under Section 4529 of the Revised Statutes (U. S. C. 46, Sec. 596). * * * The circumstances that the owner is in financial difficulties does *not* relieve him from the obligation'

with respect to claims for wages, *including* extra pay. * * *

"A similar decision was rendered in the case of *The Great Canton*, 299 Fed. 953, wherein seamen were permitted to recover an extra month's wages under R. S. Section 4527 for an improper dischage, and were allowed a *prior* maritime lien. * * * See also *Covert* vs. *The Wexford*, 3 Fed. 577; *Adolph*, 7 Fed. 501. * * *

"The rights of the officers and crew in this case to *extra pay* therefore give rise to a *lien* upon the ship, and such a *lien* must be held to be *prior* to the claims of other creditors in accordance with the general rule applicable in the courts of the United States." (Italics added.)

Compare:

The Thurlow, supra.

Marsland v. *The Yosemite*, (D. C. N. Y.), 18 F. 331-33.

Caffyn v. *Peabody*, (D. C. Wash.), 149 F. 294.

Judge Coleman, in *The Chester* (D. C. Md. 1928), *supra*, where the corporate owner was in the hands of a receiver and wherein the seamen were likewise discharged by the Marshal seizing their vessel, held:

"As was said in *The Trader*, 17 F. (2d) 623, 626, mere financial straits are not enough:

'It is the duty of the master or owner to take steps to insure the prompt payment of wages, and if financial difficulties were allowed to be a sufficient excuse, it would in many cases practically take away from the seamen their rights under the statute.' See also *Gerber* vs. *Spencer*, 278 Fed. 886." * * *

"It is well established that money payable under Section 4529 of the Revised Statutes, is payable *essentially* as wages and *not* penalties. *Gerber* vs. *Spencer, supra; Buckley* vs. *Oceanic Steamship*

Co., 5 F. (2d) 545. Further, it is axiomatic that seamen have a *lien* upon the vessel for their wages. Thus, it follows that they must also have a *lien* for *any* and *all* sums payable under Section 4529, and not merely a right to enforce a personal claim against the master or owner. *Nika*, 287 Fed. 717; *Great Canton*, 299 Fed. 953; *Covert* vs. *The Wexford*, 3 Fed. 577." (Italics added.)

In *The Thurlow, supra*, it was held:

"A very vital question is presented with respect to whether these libellants are each entitled to the penalty of four dollars per day *after* the rendition of the final decree by the District Court on November 29, 1926, to the date the wages were *actually* paid them, December 7, 1926, *without prejudice*. No appeal was taken by the *respondents* and no sufficient cause is shown for a delay in paying the wages *on the day* they were determined by the Court. Since there was *no appeal by them* and *no cause* for the delay in payment, we are of the opinion that they were entitled to this penalty of four dollars per day each from November 20, 1926, to December 7, 1926, inclusive. * * * ." (Italics added.)

Hepburn v. *Auld*, 1 Cranch 321.
Colby v. *Reed*, 99 U. S. 560.
Peugh v. *Davis*, 113 U. S. 542-545.
Yazo & M. V. Co. v. *Jackson*, 226 U. S. 217.

The principles announced by the House of Lords in *Palace Shipping Co.* v. *Caine*, A. C. 386 (July 29, 1907), mentioned in *Pacific Mail S. S. Co.* v. *Schmidt*, 241 U. S. 245, forcefully demonstrate how the admiralty law will take care that neither the ship's nor the shipowner's *duty* to pay seamen *promptly* is *evaded*. In delivering the opinion, Lord Chancellor Loreburn made the following remarks regarding issues quite similar to those now before this Court:

"* * * And though statutory provision has been made for the protection of seamen, the ancient power of the Admiralty Court to shelter them from wrong is not superseded.

"The men *lawfully* left the ship, for they were *compelled* by law *against their will* to leave it. Their engagement was *in fact* ended * * *

"The delay in payment of their wages was *not* due to the *act* or *default* of the seamen, or to any reasonable dispute as to the liability, for the liability for past wages was never disputed. It was due *solely* to the *wrongful* act or *default* of the owner or master. And, therefore, the seamen's wages continued *to run* and be payable *until they received them*, which was not till the judgment of the Court of Appeal * * *." (Italics added.)

In *The Charles Whittemore, supra,* where, as in the case at bar, efforts were made to force seamen to surrender their claims and to prejudice their endeavors to collect "waiting time", the Court said:

"This the respondent *could not do,* as it constituted *neither a payment* of the wages nor a *lawful tender* of the amount due, * * *. The fact that, in the litigation that followed, in this particular case, the court *sustained* respondent's claim to withhold the fines and penalties imposed, would not warrant the *imposition* of any *such condition* or penalty as was sought to be imposed. The *only* effect of libellants accepting the payment of the wages upon the conditions *prescribed* would have been to *surrender* their claims *entirely.* Under the law libellants were entitled to have paid them within *two days* after the termination of the voyage the amount of wages due them, and in default of such payment (U. S. C. title 46, Sec. 596) imposed a penalty of two days' pay for *each* day of delay in payment. If this *important provision* of the statute looking to securing for seamen the *prompt* payment of wages due them could be lightly avoided by the *ship's prescribing conditions* like those in this case, it would work an *easy avoidance* of a *most important provision* of the law enacted for the *protection of seamen.*"

" * * * The mariners of a ship are commonly said to be the wards of the admiralty. Their wages, their rights, their wrongs and injuries have always been a special subject of the admiralty jurisdiction."

" * * * *Benedict's Admiralty* (4th Ed.), Section 182.

"*Gerber, et als.*, v. *Spencer, et als.*, 278 Fed. 886, 889-90 (C. C. A. 9th Circuit) and cases cited.

"The libellants are entitled to recover double wages at the rate of $60.00 per month for *each day* their wages *were withheld.* * * * " (Italics added.)

The Elizabeth Maersk, (D. C. La.), 258 F. 765.
Boulton v. *Moore*, (D. C. Ill.), 14 F. 922.
Benedict's Admiralty (5th Ed.), Sec. 441.
26 *R. C. L.*, 659-660.
Davidge v. *Simmons*, (App. D. C.), 266 F. 1018.

POINT 5.—U. S. C. TITLE 46, SEC. 596, IS REMEDIAL AND SHOULD BE ENFORCED ACCORDING TO ITS PLAIN TERMS.

In the face of the fact, that in *The Noyes*, the Court below again relied on *Gerber* v. *Spencer*, in addition to its previous decisions in *Elman* v. *Moller*, 11 F. (2d) 55, and *The Whittemore, supra*, re-affirming its adherence to those cases in *The Thurlow* and again in *The Lake Galewood*, it has abruptly departed from the principles laid down therein and has embraced a novel *per curiam* method of limiting or else altogether avoiding the allowance of the statutory wages provided by U. S. C. title 46, Section 596, without assigning any cogent reason or citation of applicable authority.

The Lake Galewood, supra, where the Court of Appeals merely referred to its own previous opinions, which were in embarrassing conflict with the court's decision;

Collie v. *Fergusson* (C. C. A. 4), 31 F. (2d) 1010, (R., 75), the instant case, where no reason is assigned

nor any authority whatever relied on for the failure to allow any "waiting time".

Vir. R. Co. v. *U. S.*, 272 U. S. 658, where this Court criticized similar action on the part of a three judge statutory court sitting in the same Circuit and presided over by one of the instant Circuit Judges.

B. & O. R. R. Co. v. *U. S.*, 73 L. Ed. (Adv. Op.) 561, 563, where the Court re-iterated that:

> "The judges should have given the reasons on which they rested their decisions."

Petitioners submit that, by the decision complained of, the lower Court has in effect placed an interpretation and construction upon U. S. C. title 46, Section 596, contrary to and in the teeth of the clear and unambiguous language in which the statute was drafted by Congress and the Court reached its decision only by failing and refusing to give the language of this section its ordinary meaning. The statute being clear and unambiguous, within the constitutional authority of Congress, and to enforce and apply it exactly as it reads, not leading to absurd or impractical results, according to the decisions of this Court, there was no room or necessity in this case for construction or interpretation, the sole function of the courts being to enforce the statute according to its terms, and, as succintly phrased by Mr. Justice Holmes in *The Northern Star*, 271 U. S. 552, 556:

> "there is nothing for the courts to do but bow their heads and obey." (Italics added.)

Caminetti v. *U. S.*, 242 U. S. 470, 485, 490.

Sandberg v. *McDonald,* 248 U. S. 185, 202.
U. S. v. *Standard Brewery,* 251 U. S. 210, 217.
Dewey v. *U. S.,* 178 U. S. 510, 521.
Yazo & M. V. Co. v. *Jackson,* 226 U. S. 217.

Surely the situation found to exist in the present case aptly demonstrates the soundness of the rule laid down in *Elman* v. *Moller, supra,* where Circuit Judge Rose said:

> "The Courts should act promptly and vigorously to vindicate all the rights of seamen as well those recently conferred on them as those which date from time immemorial. We doubt not that even now they will often need all the protection which can be given them."

VI. CONCLUSION.

It is respectfully submitted that the petition for a writ of *certiorari* should be granted.

JACOB L. MOREWITZ,
Proctor for Petitioners.

PERCY CARMEL,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 423.

RUFFIN COLLIE, CLINTON COOK AND ROBBIE ROWE, PETITIONERS,

versus

THOMAS D. FERGUSSON; F. W. DARLING AND J. S. DARLING, TRADING AS J. S. DARLING & SON; S. M. SINCLAIR; W. J. WILLIAMSON; J. C. COUNCIL; NYE, THE ENGINE MAN, INCORPORATED; E. T. LAWSON AND I. E. LAWSON, TRADING AS E. T. LAWSON & SON; L. JOHNSON AND H. L. CORKRAN, TRADING AS JOHNSON & CORKRAN, AND J. V. BICKFORD, RESPONDENTS.

REPLY BRIEF FOR PETITIONERS.

JACOB L. MOREWITZ,
Proctor for Petitioners.

PERCY CARMEL,
Of Counsel.

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REPLY BRIEF FOR LIBELLANTS-PETITIONERS.

I. U. S. CODE, TITLE 46, SECTION 596, APPLIES TO THE "DOLA LAWSON".

The several repair and supply lienors, who but recently filed their appearance in this Court and have just submitted their brief (January 6, 1930), now, for the first time, seek to justify their conduct, whereby:

> "the amounts found to be due appellants were withheld from them pending this appeal at the instance of appellees, although appellees did not appeal from

> the order allowing same" (opinion of Court of Appeals: R., 74).

by making the untenable and futile contention (respondents' brief, p. 5) that:

> "Section 596, Title 46, United States Code, under which penalties are claimed in this case, does not apply to fishing or whaling vessels or yachts, and therefore does not apply to the fishing vessel 'Dola Lawson'."

This assertion is predicated on Section 26 of the Act of December 21, 1898, Chapter 28, 30 Stat. L. 756 (which is quoted thereunder in respondents' brief). They admit (respondents' brief, p. 6) that:

> "We have found no judicial determination of the point."

but base their contention on their interpretation of the note appearing in Supplement 3 to the U. S. Code Annotated, p. 449, under Title 46, Section 596, as follows:

> "The Commissioner of Navigation, commenting on this section, says: 'The statement this section shall not apply to fishing or whaling vessels or yachts, but shall apply to all vessels engaged in the taking of oysters, should appear in Section 596'."

The fallacy of respondents' argument is demonstrated when we ascertain just how fishing vessels, whaling vessels and yachts are classified in the Navigation Laws.

According to the same administrative view (now cited by respondents), there can be no question but that only vessels engaged in the whale, mackerel and cod fisheries are recognized as fishing vessels under the Federal Statutes, U. S. Code, Title 46, Section 263. Yachting

vessels are likewise specifically covered by U. S. Code, Title 46, Section 103.

The "DOLA LAWSON", as shown by the uncontradicted evidence (R., 36, 38-39), was engaged in and licensed for the coasting trade. Therefore she could not possibly come within the exceptions enumerated in the Act of December 21, 1898, even if that Act had not been repealed by subsequent all-embracing legislation, notably the Seamen's Act of March 4, 1915, and acts amendatory thereof.

It is significant, in this connection, that the editors of U. S. Code Annotated in their comment appearing at the end of U. S. Code, Title 46, Section 596, on p. 53, merely make the following suggestion:

> " 'Except as provided in Section 598 of this title, this section shall not apply to fishing or whaling vessels or yachts' or some equivalent provision should probably be added to this section'."

Indeed, it will be noted that even the comment of the Commissioner of Navigation relied on by respondents only goes so far as to suggest that his above-quoted language:

> "should appear in Section 596."

It is submitted that the Act of March 4, 1915—being a comprehensive act containing twenty sections—was passed:

> "to safeguard the seamen's welfare as workman" (*O'Hara* v. *Luckenbach*, 269 U. S. 364, 367)

contains in itself all the exemptions that Congress intended to incorporate therein. In the very first section of the Act, (U. S. Code 46, Section 569), we find a proviso that:

> "This section shall not apply to fishing or whaling vessels or yachts,"

though there is no such exception in the Act of June 7, 1872, C. 322, #14 (17 Stat. 265), which is re-enacted as Section 1 of the Act of March 4, 1915, without any reference to the Act of December 21, 1898. A similar exemption is made in Section 2 (U. S. Code, Title 46, Section 673), also without reference to the Act of December 21, 1898.

Section 12 (U. S. Code, Title 46, Section 601), on the other hand, specifically includes:

> "fishermen employed on fishing vessels as well as seamen,"

whereas Revised Statutes, Section 4536, which it repealed, contained no such proviso. It is thus evident that Congress had in mind just the particular exemptions it desired, and incorporated them only in the respective sections wherein it especially wanted to make provision therefor.

In *Inter-Island Steam Navigation Co.* v. *Byrne* (1915), 239 U. S. 459, 462, this Court had before it a quite similar point. Speaking through Mr. Justice McReynolds, the Court said:

> "* * * the suggested narrow construction would tend to defeat the particular end in view—the relief of vessels making relatively short voyages, with frequent opportunities for reaching ports, from burdensome requirements not *then* deemed essential to the welfare of seamen employed thereon. * * *.
>
> "The particular point now presented was reserved in *Wilder* v. *Inter-Island Steam Navigation Co.*, 211 U. S. 239. It has become of *less* importance since the Act of March 4, 1915, Chapter 153, 38 Stat.

at L. 1164, 1169, wherein the provisions of #61 of the *Act of 1872* were *re-enacted.*" (Italics added.)

Note: U. S. Code 46, Section 596, *re-enacts* #35 of the Act of 1872, *supra.*

To accept the "fish-boat" defense put forth at this late date by the respondents now before the Court, would, in the language of Mr. Justice McKenna's dissenting opinion in *Sandberg* v. *McDonald*, 248 U. S. 185, 202:

> "take us from the deck to the sea,—if we may use a metaphor suggested by our subject."

In *Wilder* v. *Inter-Island Steam Navigation Co.*, 211 U. S. 239, 246-7, 248, Mr. Justice Day, in delivering the opinion of this Court, used the following language, which is peculiarly applicable to the situations presented by the instant case:

> "* * *. But we are of opinion that this statute is not to be too narrowly construed, but rather to be liberally interpreted with a view to effecting the protection intended to be extended to a class of persons whose improvidence and prodigality have led to legislative provisions in their favor, and which has made them, as Mr. Justice Story declared, 'the wards of the admiralty'. *Harden* v. *Gordon*, 2 Mason 541, Fed. Cas. No. 6,047.
>
> We think, too, that the section is to be construed in the light of and in connection with the other provisions of the title of which it is a part. * * *.
>
> It seems to be clearly inferable from these provisions that wages which have thus been carefully conserved to the seamen were not intended to be subject to seizure by attachment, either before or after judgment.
>
> * * *. These provisions would be defeated if the seaman's wages, to be recovered at the end of the voyage, could be at once seized by an execution

> or attachment after judgment in an action at law. The evident purpose of the Federal statutes, that the seaman shall have his remedy in admiralty, would be defeated, and the seaman, in many cases, be turned ashore with nothing in his pocket, because of judgments seizing his wages, rendered, it may be, upon improvident contracts, from which it was the design and very purpose of the admiralty law to afford him protection."

Having carefully refrained from touching on a single one of the array of authorities relied on in petitioners' brief, it is evident that respondents are unwilling to give this Court the benefit of their:

> "authorities to the effect that a penalty statute such as Section 596 must be strictly construed." (Respondents' brief, p. 6.)

II. THE INSTANT SEAMEN ARE ENTITLED TO "WAITING TIME" AND DAMAGES, AS AGAINST CLAIMS OF RESPONDENTS, OUT OF FUND REALIZED FROM SALE OF VESSEL.

A sufficient answer to respondents' final contention that the present seamen are not entitled to the statutory wages provided by U. S. Code, Title 46, Section 596, as against claims of other maritime lienors, is found in the attitude displayed by these lienors from start to finish. Instead of seeing to it that the seamen were paid their wages as soon as the vessel was sold, we find that these amounts were withheld, at the instance of said lienors, in the teeth of the liberal doctrines of the admiralty in respect to the immediate payment of seamen's wages, as well as the letter and spirit of the remedial legislation passed to further ameliorate the condition of these "wards of the admiralty". See U. S. Code, Title 46, Section 601, hereinabove referred to.

Surely this Court will not sanction a method of procedure whereby, in the language that it adopted in *Wilder* v. *Inter-Island Steam Navigation Co., supra*:

> "A new hardship is added to a vocation already subject to its full share of the ills of life."

The lienors' brief, at p. 6, states:

> "As to whether or not they are entitled under the circumstances to a personal decree against the master and owner of the vessel for such penalties, these respondents are not concerned."

Petitioners submit that by this statement said respondents have inadvertently demonstrated their entire disregard of petitioners' rights in this matter. When we find that respondents' three District Court decisions interpreting U. S. Code, Title 46, Section 596, as a penalty statute, are contrary to and in the teeth of the great weight of authority discussed on pp. 12-26 of petitioners' opening brief, it would seem that these respondents should have been vitally concerned in leaving no stone unturned in having the wages earned by petitioners paid over to them with a minimum of delay, or at least, in *not* adopting the obstructive tactics that they employed. Indeed, *The President Arthur*, 25 F. (2nd) 1002, cited in respondents' brief, p. 7, allowed the seamen a maritime lien of the one month's extra pay, provided by U. S. Code, Title 46, Section 594, on a parity with their earned wages, out of the fund realized from the sale of the vessel, where the owner was in the hands of a receiver.

The Moshula, 276 Fed. 35, a decision of the District Court at San Francisco, rendered on October 5, 1921, is overruled by the opinion of the Ninth Circuit Court of Appeals in *Gerber* v. *Spencer*, 278 Fed. 889, handed down

on February 13, 1922, in which a rehearing was denied March 2, 1922.

In *The Acropolis,* 8 F. (2nd) 110, the owner was in the hands of a receiver in bankruptcy, and, like the owner of *The President Arthur*:

> "was unable to use any of the funds for the purpose of paying such wages."

Even if U. S. Code, Title 46, Section 596, had never existed, petitioners would, in view of the facts disclosed by the present record, still be entitled to "waiting time", under the doctrines repeatedly emphasized by this Court and the British House of Lords.

In *Palace Shipping Co.* v. *Caine,* A. C. 368 (1907), with regard to this phase of the matter, the House of Lords said:

> "* * * . And though statutory provision has been made for the protection of seamen, the ancient power of the Admiralty Court to shelter them from wrong is not superseded."

In *Sheppard* v. *Taylor,* 5 Peters 710, Mr. Justice Story, speaking for this court, held:

> "* * * . If the ship had been specifically restored, there is no doubt that the seamen might have proceeded against it in the admiralty, in a suit *in rem,* for the *whole* compensation due to them. They have by the Maritime Law an *undisputable* lien to this extent. This *lien* is *so sacred* and *indelible* that it has, on more than one occasion been expressly said, that it adheres to the last plank of the ship. 1 Peters Admiralty Reports, note 186, 195; 2 Dodson's Rep. 13; *The Neptune,* 1st Hagg. Admiralty Reports 227-239."

Compare *Slaker* v. *O'Connor*, 278 U. S. 188.
Roe v. *Kansas*, 278 U. S. 191.

In *Slaker* v. *O'Connor*, this Court said:

> "Here, without any authority of law, the appellant obtained an appeal. Thereby he has needlessly consumed our time and imposed serious delay upon the appellees and otherwise burdened them."

In *Roe* v. *Kansas*, this Court held:

> "The alleged ground for the present writ is without substance and the circumstances justify the imposition of a penalty upon the party at fault."

Compare: Rule 30, sub-div. 2 & 4,—Supreme Court of the United States and the ten Circuit Courts of Appeal.

In the instant case the Court of Appeals likewise found (R. 74) that the distribution of the wages admitted to be due petitioners was withheld, (R., 63-64), at the instance of the respondents, "without any authority of law"—obviously on the ground that the right of these seamen to the immediate payment thereof "existed under any and all circumstances".

Compare: *Gilfillan* v. *McKee*, 159 U. S. 302.
The C. S. Holmes (C. C. A. 9), 237 Fed. 785.
The Rolph (C. C. A. 9), 299 Fed. 52, 55-56.

Nevertheless, as pointed out in their application for certiorari, p. 2, and brief in support thereof, pp. 9, 12, 13, petitioners were refused any part of the statutory wages that had accrued to each of them, which surely began to run, under the circumstances of this case, from the respective dates that their several claims were filed (R., 3-6; 17-19), or else, at the very least, im-

mediately after the findings made by the trial court on June 8, 1928, June 12, 1928, and September 4, 1928, respectively. Instead of such statutory wages, only interest was added to the wages improperly withheld, which interest was swallowed up by the one-half appellate costs assessed against petitioners, (R., 74-76), their share of these costs amounting to more than two and one-half times the interest then accrued. Neither of the courts below passed on the right of petitioners, Collie and Cook:

> "to damages for the breach of their respective contracts of hire, including, in the case of Ruffin Collie, return transportation and subsistence to Washington, North Carolina, the port of his shipment?" (Assignment of Error No. 4, R., 66.)

III. CONCLUSION.

The decree below should be modified, with directions that all the petitioners be allowed "waiting time" until the judgment of this Court is fully satisfied.

Primarily, this Court should provide for the exhaustion of the $1,600.00 balance in the District Court's registry to the payment of petitioners' earned wages, in addition to the extra pay and indemnities due each of said seamen, and the transportation and subsistence money due petitioner Collie, plus *full* costs of *all* the Courts,—"in preference to all other claims"; with a judgment over against the defaulting owner, Thomas D. Fergusson, for any deficiency, as well as *all* claims of the other respondents, he being liable *in personam,* under the pleadings and proofs.

Respectfully submitted,

J. L. Morewitz,
Proctor for Petitioners.

Percy Carmel,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM 1929.

No. 423

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR F. W. DARLING and J. S. DARLING, trading as J. S. DARLING & SON; S. M. SINCLAIR; E. T. LAWSON and I. E. LAWSON, trading as E. T. LAWSON & SON, W. J. WILLIAMSON, trading as WILLIAMSON'S, J. C. COUNCIL, and L. JOHNSON and H. L. CORKRAN, partners trading as JOHNSON AND CORKRAN.

D. ARTHUR KELSEY,
R. ARTHUR JETT,
WALTER SIBERT,
HENRY BOWDEN,
SAMUEL E. FORWOOD,
Of Counsel.

LEON T. SEAWELL,
Proctor for Respondent.

W. T. BARRON & CO., INC., NORFOLK, VA.

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I. OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported in 31 Fed. (2d.), 1010. The District Court for the Eastern District of Virginia did not render a written opinion, but its conclusions are contained in the Court's decree found at pages 58, et seq. of the record.

II. JURISDICTION OF THIS COURT.

The Circuit Court of Appeals having affirmed the District Court and denied a rehearing, the decree sought to be reviewed is the decree of the Circuit Court of Appeals, entered on July 1st, 1929, and found upon page 79 of the record.

III. THE PARTIES HERE PRESENTED.

An appearance has been made and this brief is filed on the part of F. W. Darling and J. S. Darling, trading as J. S. Darling & Son, the original libellants and the other intervening libellants and petitioners named at the beginning of this brief, and there is no appearance in this Court nor was there an appearance in the Circuit Court of Appeals on behalf of Thomas D. Fergusson, the owner and master of the fishing vessel "DOLA LAWSON".

IV. QUESTIONS PRESENTED.

The questions presented, so far as these respondents are concerned, are (1) whether or not Section 596 Title 46, United States Code, providing that every master or owner who refuses or neglects, without sufficient cause, to pay to every seaman on any vessel making coasting voyages a sum equal to two days' pay for each and every day during which payment is delayed beyond a period of two days after the termination of the agreement under which the seaman was shipped or at the time such seaman is discharged, applies to fishing vessels such as the "DOLA LAWSON"; and (2) where the master or owner has no interest in the proceeds of sale of the vessel in the registry of the Court, whether or not the burden of the penalties provided by Section 596 shall be transferred from the master and owner to the lien holders who have intervened along with the seaman and the amount set aside for the payment of their claims used for the payment of such penalties.

The other points raised by the petitioners in their application for a writ of certiorari deal with(a) damages for breach of the seamen's contract for hire, (b) the propriety of the District Court in suspending the operation of its decree of distribution, and (c) an alleged conflict, as construed by counsel for the petitioners in the findings of the

Circuit Court of Appeals, are all matters within the province of the particular court ruling upon the same and are not such matters as demand a review by this Court. Where it is evident that a correct result has been reached, questions concerning the correctness of particular rulings not affecting such results are immaterial. *Carlisle Packing Company v. Sandanger*, 259 *U. S.*, 255; *Sun Company v. Vinton Petroleum Company*, 248 *Fed.*, 623, *certiorari denied*, 247 *U. S.*, 514; *Dimmit v. Breakley*, 267 *Fed.*, 792, *certiorari denied* 254 *U. S.*, 641.

V. FACTS AND PROCEEDINGS BELOW

The "DOLA LAWSON" was a small fishing trawler of 24 gross and 15 net tons, and at the time she was libeled was owned by Thomas D. Fergusson, Hampton, Virginia.

The original libel was filed on May 14th, 1928, by Darling & Son for repairs, supplies and other necessaries furnished the vessel, amounting to the sum of $543.07, for which a maritime lien was claimed. (R. 2) On May 16th, 1928, the intervening petition of Ruffin Collie and Clinton Cook was filed. Collie claimed he was employed by the owner of the said vessel on January 15th, 1928, as cook, at wages of $100.00 per month, and that there was due him the sum of $375.00 straight wages and $20.00 over time, and up to the time of the filing of his petition he had received from the owner of the vessel on account of his wages the sum of only $25.00. Clinton Cook claimed he was employed on January 1st, 1928, as deckhand and oiler at wages of $80.00 per month and that at the time his petition was filed there was $360.00 due him as straight wages and $20.00 for over time, making a total of $380.00, and during the entire period of his employment he had not been paid anything on account of wages. (R. 3).

Robbie Rowe filed his intervening petition on June 23rd, 1928. He claimed he was employed on September 1st, 1927, as seaman at the rate of $25.00 per week, and that there was due him for a period of six weeks from that date the sum of $150.00, upon which there had been a payment made him by the owner of $5.00, leaving a balance due of $145.00. (R.17). His employment on said vessel had, therefore, terminated about seven months before the original libel was filed. In addition to their wages, Collie, Cook

and Rowe each claimed, under Section 4529 R. S. U. S. (Sec. 596, Title 46, U. S. C.), two days' pay for each day their wages were withheld from them without sufficient cause.

Intervening libels and petitions were filed on May 16th, 1928, by respondent, S. M. Sinclair, for repairs, supplies and other necessaries amounting to $355.49 (R. 7); by E. T. Lawson & Son on May 21st, 1928, for repairs, supplies and other necessaries furnished said vessel amounting to the sum of $687.36 (R. 8); by respondent, W. J. Williamson, trading as Williamson's, on May 24th, 1928, for repairs, supplies and other necessaries furnished the vessel amounting to the sum of $30.41 (R. 10); by respondent, J. C. Council, on May 24th, 1928, for repairs, supplies and other necessaries furnished said vessel amounting to the sum of $90.35 (R. 11); by respondents, Johnson and Corkran, on May 25th, 1928, for repairs furnished said vessel amounting to the sum of $423.50 (R. 13); by respondent, J. V. Bickford, on May 29th, 1928, for repairs furnished said vessel amounting to $42.25 (R. 15); and by respondent, Nye, The Engine Man, Incorporated, on June 8th, 1928, for repairs, supplies and other necessaries furnished said vessel amounting to $380.27 (R. 15).

VI. THE FINDINGS OF THE DISTRICT COURT

The vessel was sold at Marshal's sale for the sum of $1,650.00. The court costs amounted to the sum of $224.26. The District Court allowed the full wages claimed by Collie, which with interest amounted to the sum of $402.57; the full wages claimed by Cook, which with interest amounted to the sum of $388.00; and the full wages claimed by Rowe, which with interest amounted to the sum of $151.00, but refused to allow either of said petitioners penalties under Section 596 Title 46, United States Code. The remainder of said fund amounting to $474.17 was apportioned among the libellants and intervenors who had furnished repairs, materials and supplies to the vessel in the aggregate sum of $2,867.07. (R. 58).

VII. THE FINDINGS OF THE CIRCUIT COURT OF APPEALS.

An appeal having been taken by the petitioners, the Circuit Court of Appeals affirmed the District Court, but

allowed interest for the time during which the amounts due the petitioners had been withheld from them incident to the appeal. (R. 74).

VIII. ARGUMENT.

Section 596, Title 46, United States Code, under which penalties are claimed in this case, does not apply to fishing or whaling vessels or yachts, and therefore does not apply to fishing vessel "DOLA LAWSON". Section 596 was originally Section 4529 U. S. R. S., which was amended by Section 4 of the Act of December 21st, 1898, Chap. 28, 30th Stat., 756. Section 26 of this Act is as follows:

> "That this act shall take effect sixty days after its approval and shall apply to all vessels not herein specifically exempted but Sections one, two, three, four, five, six, seven, eight, nine, ten, eleven, thirteen, fourteen, fifteen, twenty-three and twenty-four, shall not apply to fishing or whaling vessels or yachts."

Section 4529 was again amended by the Act of March 4th, 1915, 38 Stat., 1164, in substantially the same language except that it provided for the payment of a sum equal to two days' pay for each day during which payment was delayed, while the Act of December 21st, 1898 provided for one day's pay. It is clear that the Act of 1915 in no way repealed Section 26 of the Act of 1898, and that the same is still in force, and that Section 596 dealing with penalties does not apply to fishing or whaling vessels or yachts. Section 4 of the Act of June 28, 1906, 34 Stat., 551, as originally enacted, provided that Sections 4, 6 and 24 of Chap. 28 of the Acts of Congress, approved December 21st, 1898, shall apply to all vessels engaged in the taking of oysters, anything in Section 26 of said last mentioned act to the contrary notwithstanding. This act now appears in the United States Code as Section 598, Title 46, and is as follows:

> "Sections 596, 599 and 604 shall apply to all vessels engaged in the taking of oysters."

If the Act of March 4th, 1915, repealed Section 26 of the Act of December 21st, 1898, and as a result thereof made Section 4529 U. S. R. S., applicable to all coasting

vessels regardless of their character, then it also repealed Section 4 of the Act of June 28th, 1906, and Section 598, Title 46, United States Code, making vessels engaged in taking oysters subject to said Section 4529 U. S. R. S., now Section 596, Title 46, U. S. C., is entirely superfluous and has no place in the United States Code.

This view is clearly the opinion of the Department of Commerce, Bureau of Navigation, as we find this note in Supplement 3 to the Official Edition of the United States Code, p. 449, under Section 596, Title 46:

> "The Commissioner of Navigation, commenting on this section says: 'The statement this section shall not apply to fishing or whaling vessels or yachts, but shall apply to all vessels engaged in the taking of oysters, should appear in Section 596.'"

We have found no judicial determination of the point. If the administrative view of the law as it now exists is correct, and we submit there is every reason to believe that it is, then these petitioners are not entitled to penalties or extra wages for the delay incident to the sale of the vessel and adjudication of the questions by the lower courts. We do not think it is necessary to cite authorities to the effect that a penalty statute such as Section 596 must be strictly construed.

IX. SEAMEN NOT ENTITLED TO PENALTIES AS AGAINST CLAIMS OF OTHER MARITIME LIENORS.

Even should this court determine that Section 596 applies to fishing vessels, we submit that under the circumstances of this case the seamen are not entitled to payment of penalties from the proceeds of sale as against the claims of other maritime lienors. As to whether or not they are entitled under the circumstances to a personal decree against the master and owner of the vessel for such penalties, these respondents are not concerned.

In any event we do not think Robbie Rowe is entitled to penalties or waiting time. The facts show that he waited months after his employment ended, all the time himself a resident of the Port of Hampton, which was the home port of the vessel, and the base of her operations, to make his

demand. The employment of Collie and Cook was a verbal contract for no specific time. They were not under shipping articles and under the decision of the Circuit Court of Appeals for the Fourth Circuit in the *Pokanoket*, 156 *Fed.*, 241, it was nothing more nor less than a hiring at will which could have been terminated by either party at any time. Their employment was terminated by the seizure of the vessel under admiralty process for the purpose of converting her into cash to pay the liens against her. Both Collie and Cook intervened and made themselves parties to these proceedings. We do not see how they can well take advantage, so far as other lien claimants are concerned, of the delay incident to selling the seized property and the adjudication of the amount and rank of the claims principally the wage priorities claimed by them therein.

We find the following district court decisions dealing with the precise point.

In the case of *The Moshula*, 276 *Fed.*, 35, the court says at page 36:

> "In the present case neither the master nor the owner has any interest in the fund now in the registry of the court resulting from the sale of the vessel. To allow the penalties would be to transfer the burden thereof from the master and owner to the lien holders and the mortgagee. This I do not believe was ever contemplated or intended by Congress in enacting the statute in question."

And in the case of *The Acropolis*, 8 *Fed.*, (2*d.*), 110, Judge Campbell, of the District Court for the Eastern District of New York says at page 110:

> "It thus appears that the intent of the statute is to punish the refusal or neglect of the master or owner, and is personal to them; therefore subsequent lienors should not have the fund to which they must look for payment depleted to pay a penalty which, if even properly allowable, should be paid by the master or owner."

See also the President Arthur, 25 Fed. (2d.), 1002.

X. CONCLUSION.

The petitioners have been allowed the full amount of wages earned by them with interest, and we think they have received full justice in this case. We submit that even if the statute providing for penalties is applicable to fishing vessels, that to deplete the small remainder of the fund alloted to the payment of lien claims for repairs, supplies and other necessaries furnished the vessel, would place upon such lienors a harsh and unjust burden. We respectfully request that the decree of the Circuit Court of Appeals be in all respects affirmed.

LEON T. SEAWELL,
Proctor for Respondents.

D. ARTHUR KELSEY,
R. ARTHUR JETT,
WALTER SIBERT,
HENRY BOWDEN,
SAMUEL E. FORWOOD,
Of Counsel.

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Supreme Court of the United States

No. 423—October Term, 1929.

RUFFIN COLLIE, CLINTON COOK, AND ROBBIE ROWE,
PETITIONERS,

vs.

THOMAS D. FERGUSSON, F. W. DARLING, AND J. S. DARLING,
TRADING AS J. S. DARLING & SON, ET AL.

PETITION FOR REHEARING.

Come now the above named petitioners and present this their petition for a rehearing of the above entitled cause, and in support thereof respectively show:

Concerning the Lien for Waiting Time.

The rule seems to be well settled that the re-enactment in the same or substantially the same terms, of a statute which has received a judicial construction, amounts to a legislative adoption of such construction.

See Chief Justice White's discussion of this rule in *Heald v. District of Columbia*, 254 U. S. 20, also in 65 L. ed. 106, and the annotation appended thereto; *Hecht v. Malley*, 265 U. S. 144; *Gulf, C. & S. F. R. Co. v. Moser*, 275 U. S. 133. Cf. Pet. Opening Brief, pp. 13-26, where the judicial history of R. S. 4527 and R. S. 4529 is related.

This Honorable Court recognizes herein that:

"The claim for double wages which, when valid, is by the terms of the statute 'recoverable as wages,' has been held to be embraced in the

seaman's lien for wages, with priority over other liens, and governed by the procedure applicable to suits for the recovery of seamen's wages." Cf. prevailing authorities cited by this Court under language quoted. Also Pet. Reply Brief, pp. 4-10.

Yet, despite *Gerber v. Spencer* (CCA 9) 278 Fed. 886; *Covert v. British Brig Wexford,* (Choate, J.), 3 Fed. 577, 578-579; *Cox v. Lykes Brothers,* 237 N. Y. 376; *The Astoria,* (CCA 9) 281 Fed. 618; *The El Estro,* (CCA 5) 25 F. (2d) 349; *Burns v. Davis,* (CCA 1) 271 Fed. 439, and apparently overruling and in disregard of the principles laid down in *The Steel Trader,* 275 U. S. 388, (a suit *in rem* construing, like *The Astoria,* supra, R. S. 4527, which does not differ in essentials from R. S. 4529); *Sheppard v. Taylor,* 5 Peters 710, (allowing seamen from one to four and one-half years wages as damages, out of a fund laboriously recovered at great expense, by the deceased *insolvent* owners' bona fide assignees, for a confiscated vessel); *The Resolute,* 168 U. S. 437, at p. 440, (construing U. S. Code, Title 46, Section 600); *Wilder v. Inter-Island Steam Nav. Co.,* 211 U. S. 239, 246-7, 248, (interpreting U. S. Code, Title 46, Section 601), as well as those enunciated by the British House of Lords in *Palace Shipping Co. v. Caine,* (1907) A. C. 368, (construing the parent section of the Merchant Shipping Act on which R. S. 4529 is modeled), the Court now holds:

> "That the liability is not imposed regardless of the fault of the master or owner, or his retention of any interest in the vessel from which payment could be made. It can afford no such protection and exert no effective coercive force where delay in payment, as here, is due to the insolvency of the owner and the arrest of the vessel, subject to accrued claims beyond its value. Together

these obstacles to payment of wages must be taken to be a sufficient cause to relieve from the statutory liability."

This Court having at the same time declared that the language in Section 4529:

> "is designed to prevent by its coercive effect, arbitrary refusals to pay wages and to induce prompt payment when payment is possible"

petitioners submit that the situations found to exist in this case emphatically call for the allowance of waiting time, their wages being *still* tied up (R. 64).

Cf. R. 62, 2nd par., 1st line, from which, between the words "that" and "the"—as shown on Final Decree certified up as *original* document (R. 69, 72, 78)—the following language was *interlineated* by the trial court as *not* being a fact:

> "Respondent Fergusson * * * did not pay his seamen their respective wages because of the financial difficulties he found himself in, and that, therefore, etc." Also see Respondent's Draft, (R. 56).

Here the lienors themselves, two of whom bought in the "Dola Lawson," (R. 21-22), sought to absorb the entire proceeds of the sale, arbitrarily causing Cook and Collie to be denied payment of their wages out of the proceeds deposited on *June 20, 1928* (R. 58-59), though said wages had been previously adjudged to be due them on *June 8, 1928,* and *June 12, 1928,* respectively. On *September 4, 1928,* the formal decree distributing the wages admittedly due is likewise found to have been suspended at the instance of respondents, (R. 74). Nevertheless they are held, under such circumstances, to be:

> "neither within the letter nor the spirit of the statute,"

though obviously on *June 20, 1928,* there was no "obstacle to the payment of wages," nor any "reasonable degree" of *moral justification* for the refusal to pay thereafter. Cf. *Gerber v. Spencer, Cox v. Lykes,* supra.

Whether the reason actuating respondents was their desire to coerce petitioners into abandoning the appeal, or to secure to said adverse claimants their appellate costs out of the fund in the Registry, the result is the same. Manifestly, under U. S. Code: Title 28, Section 837, and Title 46, Section 601, petitioners were entitled to *forthwith* receive their wages and to pursue *their* appeal without prepayment or security for costs, (R. 3, 65, 72). Accordingly, if this Court's present decision remains unaltered, the net result to these seamen will be that despite the splendid principles enunciated herein:

> "A new hardship is added to a vocation already subject to its full share of the ills of life." *Wilder v. Inter-Island Steam Navigation Co.,* supra. Cf. *The Resolute,* supra; Rec. pp. 76-77; Pet. Op. Brief, pp. 2, 11-26; Pet. Reply Brief, pp. 5-10, their checks, drawn 3 months *after* the decision (R. 64, 74) of the Court of Appeals, *necessarily* remaining uncashed pending this Court's determination of their rights.

Under the Ship Mortgage Act, as interpreted in *The Northern Star,* 271 U. S. 562, a lien for the full value of a vessel can be placed against her without the seamen on board having any intimation thereof. Seamen in the nature of things cannot be expected to keep abreast of such transactions any more than they could have acquired, as a practical matter, previous knowledge of the long outstanding (R. 59-62), repair and supply claims of the present respondents. This brings us back to the fundamental proposition that if a seaman has a lien for

the waiting time provided by Section 4529, in order to be of any earthly benefit to him it must be:

> "held to be embraced in the seamen's lien for wages with priority over other liens, etc." Cf. *The Steel Trader* and other prevailing decisions, supra.

Having found that the amounts awarded to petitioners as wages have been unwarrantably retained due to the action of the respondents, whose claims in the main accrued *long* prior to petitioners' employment (R. 59-62), even if there were no applicable statute, this Court should, like the House of Lords in *Palace Shipping Co. v Caine*, supra, extend to these still *unpaid* seamen:

> "the ancient power of the Admiralty Court to shelter them from wrong . . . ."

Surely this is not accomplished in denying both waiting time and interest, and by merely increasing, from one-half to two-thirds, the costs allowed by the Court of Appeals,—where the matter was heard on typewritten transcripts (R. 72)—a difference of but sixteen and two-thirds per cent, or approximately $31.00 of the $189.70 costs taxed *prior* to the allowance of certiorari. Cf. Pet. for Certi., p. 2; R. 74-77. This latter sum does *not* include $155.00 for certifying and printing the record filed here, nor the other necessary costs incurred in submitting the matter to this Honorable Court, all of which ought to be allowed in this Court's mandate when it goes down. Cf. *Fairmont Creamery Co. v. Minn.*, 275 U. S. 70, and *St. L. & S. F. R. Co., v. Spiller*, 275 U. S. 156; Rule 30, sub-div. 2 & 4, and Rule 32, sub-div. 3, Sup. Ct. U. S.; *Benedict's Admiralty* (5th Ed.) Sec. 561.

Concerning the Owner's Waiting Time Liability.

Whatever might be thought of the validity of their liens under this remedial Act, there is surely no logical reason why the petitioners are not entitled to a decree against Fergusson, the drunken (R. 38, 39) master and owner, for the waiting time due them. To deny them these statutory wages, certainly as against such defaulting employers, would amount to nothing less than a frustration of the remedy repeatedly sought to be given the seamen by Congress since the formulation of the very first Judiciary Act.

> Cf. authorities cited in this Court's opinion (which does not refer to any of its previous decisions on analogous matters), with *The Steel Trader, Sheppard v. Taylor, The Resolute, Wilder v. Inter-Island, Palace v. Caine,* supra,—none of which are mentioned therein.

In the instant case, Fergusson was liable under the express terms of Section 4529, being both the master and the owner. Under the Court's present determination he is permitted to escape all liability for waiting time on the assumption that he is insolvent, and that this exception must be read into the statute. While it is perhaps true that it might be difficult to collect anything from Fergusson, his own testimony makes it clear (R. 38), that he has never made any defense on the ground of insolvency or otherwise. Indeed the decree below, as modified by this Court, will still provide for alternative judgments against Fergusson for petitioners' wages, plus interest, and also *in personam* judgments over in favor of the repair and supply lien claimants (R. 59-61), as well as a personal judgment against him in favor of Respondent Council, whose lien claim was stale (R. 62).

Fergusson very frankly admitted that:

> 'The claims asserted by Ruffin Collie and Clinton Cook in their intervening libel are correct." (R 37, 38. 44-45).

Even if it were shown that Fergusson was insolvent, it is submitted that there is nothing in the statute or the authorities which in any way indicates that by squandering the earnings of the vessel in satisfying his thirst for drink (R. 38, 39) he could exempt himself from a judgment for the statutory liabilities imposed by the Act. R. 36; Cf. R. 76-77; Language interlineated on *original* of Final Decree, quoted supra, p. 3.

Conclusion

For the foregoing reasons it is respectfully urged that this petition for rehearing should be granted, and, upon further consideration of the case, that the decree herein be further modified in the particulars mentioned; that an order be forthwith entered withholding the mandate herein until the further direction of the Court; and that the petitioners may have such other and further relief as in law and justice they may be entitled to receive.

JACOB L. MOREWITZ,
Proctor for Petitioners.

PERCY CARMEL,
Of Counsel.

I, Jacob L. Morewitz, Proctor for the above named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

JACOB L. MOREWITZ.

SUPREME COURT OF THE UNITED STATES.

No. 423.—October Term, 1929.

Ruffin Collie, Clinton Cook, and Robbie Rowe, Petitioners, *vs.* Thomas D. Fergusson, F. W. Darling, and J. S. Darling, Trading as J. S. Darling & Son, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[February 24, 1930.]

Mr. Justice Stone delivered the opinion of the Court.

This case is here on writ of certiorari, granted October 28, 1929, to review a decree of the Court of Appeals for the Fourth Circuit, which affirmed, without opinion, a decree of the District Court of Eastern Virginia, denying, also without opinion, the claims of petitioners, who are seamen, for double wages for "waiting time", under R. S. § 4529, Tit. 46, U. S. Code, § 596 (Act of July 20, 1790, c. 29, § 6, 1 Stat. 133; Act June 7, 1872, c. 322, § 35, 17 Stat. 269, as amended, Act December 31, 1898, c. 28, § 26, 30 Stat. 764; Act March 4, 1915, c. 153, § 3, 38 Stat. 1164).

The power boat "Dola Lawson", licensed for coastwise trade, and Fergusson, her owner, were libelled for repairs and materials supplied to the vessel. Intervening petitions were filed, setting up claims for wages and the statutory allowance for waiting time in the case of the present petitioners, and for repairs, materials and supplies in the case of other libellants. The vessel was sold by order of the court and the proceeds, which are insufficient to satisfy the claims allowed, were paid into the registry of the court to the credit of the cause.

The employment of two of the petitioners was terminated by the seizure of the vessel. That of the third, Rowe, was terminated by mutual consent some six months before the seizure. There was evidence from which the trial court might have concluded that he consented to deferred payment of his wages because of the financial necessities of the owner. It was admitted on the argument that

the owner, because of his insolvency, was unable to pay seamen's wages and that petitioners must look alone to the proceeds of the vessel for the satisfaction of their claims, admissions which find support in the confused, and in many respects unsatisfactory record.

The District Court denied petitioners' claims for double wages for waiting time, but decreed payment of the wages due, with interest, as prior liens. Although the other lienors did not appeal, the court, at their instance, but for reasons which do not appear, suspended the decree pending the appeal, so that the wages allowed could not be paid from the proceeds of the vessel. To the amounts found due the petitioners, the Court of Appeals added interest until payment.

Section 4529, so far as relevant, provides: "The master or owner of any vessel making coastwise voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens. . . . Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned, without sufficient cause, shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed . . . , which sum shall be recoverable as wages in any claim made before the Court . . ."

The claim for double wages which, when valid, is by the terms of the statute "recoverable as wages", has been held to be embraced in the seaman's lien for wages, with priority over other liens, and governed by the procedure applicable to suits for the recovery of seamen's wages. *The Trader,* 17 F. (2d) 623; *Gerber* v. *Spencer,* 278 Fed. 886; *The Nika,* 287 Fed. 717; *The Great Canton,* 299 Fed. 953; *The Fort Gaines,* 18 F. (2d) 413; *The St. Paul,* 77 Fed. 998; *Buckley* v. *Oceanic S. S. Co.,* 5 F. (2d) 545; *The Charles L. Baylis,* 25 Fed. 862; *The British Brig Wexford,* 3 Fed. 577; *Cox* v. *Lykes Brothers,* 237 N. Y. 376; cf. *The Morning Star,* 1 F. (2d) 410, 411.

With these rulings as a premise, petitioners argue that the statutory allowance is compensatory; that it accrues upon mere delay in payment of wages, and may be recovered by including it in petitioners' liens for wages, which have priority over the liens of materialmen, notwithstanding the general rule that events subsequent to the seizure do not give rise to liens against a vessel in

custodia legis. See The *Young America,* 30 Fed. 789, 790; *The Nisseqoque,* 280 Fed. 174, 181; *The Grapeshot,* 22 Fed. 123. Cf. *The New York Dock Co.* v. *The Poznan,* 274 U. S. 117.

But the increased payment for waiting time is not denominated wages by the statute, and the direction that it shall be recovered as wages does not purport to affect the condition prerequisite to its accrual that refusal or neglect to pay shall be without sufficient cause. The phrase "without sufficient cause" must be taken to embrace something more than valid defenses to the claim for wages. Otherwise, it would have added nothing to the statute. In determining what other causes are sufficient, the phrase is to be interpreted in the light of the evident purpose of the section to secure prompt payment of seamen's wages (H. R. Rep. 1657, Committee on the Merchant Marine and Fisheries, 55th Cong., 2nd Sess.) and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarily exposed.

The words "refuses or neglects to make payment . . . without sufficient cause" connote, either conduct which is in some sense arbitrary or wilful, or at least a failure not attributable to impossibility of payment. We think the use of this language indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible. Hence we conclude that the liability is not imposed regardless of the fault of the master or owner, or his retention of any interest in the vessel from which payment could be made. It can afford no such protection and exert no effective coercive force where delay in payment, as here, is due to the insolvency of the owner and the arrest of the vessel, subject to accrued claims beyond its value. Together these obstacles to payment of wages must be taken to be a sufficient cause to relieve from the statutory liability. *The Trader, supra; Feldman* v. *American Palestine Line, Inc., supra.* Cf. *Gerber* v. *Spencer, supra.* Otherwise, it would not be imposed on the owner directly or through his interest in the ship, but only upon the lienors, who are neither within the letter nor the spirit of the statute.

That the liability is not incurred where the refusal to pay is in some reasonable degree morally justified, or where the demand for

wages cannot be satisfied either by the owner or his interest in the ship, has been the conclusion reached with practical unanimity by the lower federal courts. *The Wenonah*, Fed. Cas. No. 17,412; *The General McPherson*, 100 Fed. 860; *The Alice B. Phillips*, 106 Fed. 956; *The George W. Wells*, 118 Fed. 761; *The Express*, 129 Fed. 655; *The St. Paul, supra*; *The Sadie C. Sumner*, 142 Fed. 611; *The Amazon*, 144 Fed. 153; *The Sentinel*, 152 Fed. 564; *Pacific Mail S. S. Co.* v. *Schmidt*, 214 Fed. 513, 520; *The Moshulu*, 276 Fed. 35; *The Acropolis*, 8 F. (2d) 110; *Villigas* v. *United States*, 8 F. (2d) 300; *The Trader, supra*; *Feldman* v. *American Palestine Line, Inc., supra*; cf. *The City of Montgomery*, 210 Fed. 673, 675; *Burns* v. *Fred L. Davis Co.*, 271 Fed. 439; *Gerber* v. *Spencer, supra*; *The Lake Galewood*, 21 F. (2d) 987.

The evidence affecting the claim of Rowe is not reviewed, since, as already indicated, there is evidence which, in the light of the statute as now interpreted, supports the concurrent action of the two courts below.

It is unnecessary to pass upon the contention, apparently first made here, that § 4529 does not apply to fishing vessels (see Notes to § 596, Tit. 46, U. S. C. A.), and that the "Dola Lawson", although licensed for the coastwise trade, must be deemed excluded from the operation of the Act because of her use as a fishing vessel.

In view of the unwarranted retention of the amount awarded to petitioners, as wages, by that part of the decree of the District Court from which no appeal was taken, the costs in the Court of Appeals will be divided, two-thirds to appellants and one-third to appellees, and the decree below as so modified will be

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.